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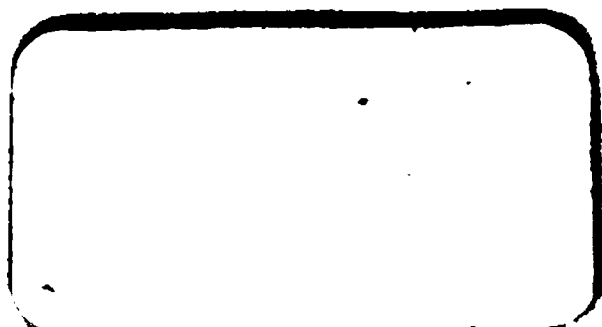
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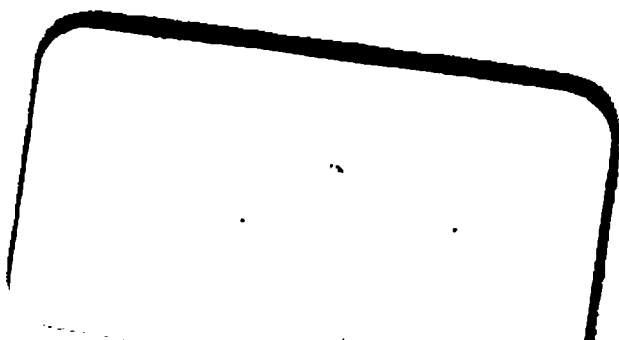
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HAWAIIAN REPORTS

VOLUME 14.

CASES DECIDED

IN THE

Supreme Court of the Territory of Hawaii

January 13, 1902, to May 20, 1903

HONOLULU:
HAWAIIAN GAZETTE COMPANY
1903.

Rec. Feb. 23, 1904.

ERRATA.

Page 126, "Original" omitted.

Page 316, "Frear, C.J., Galbraith and Perry, JJ.," omitted from title.

Page 327, "Opinion of the Court by Galbraith, J.," omitted.

Page 393, "Appeal from Auditor" omitted.

Page 498, read "names" for "means" at end of 6th line of decision.

113/2

JUSTICES
OF THE
SUPREME COURT OF HAWAII

DURING THE TIME OF THESE REPORTS:

CHIEF JUSTICE,

HON. WALTER FRANCIS FREAK.

ASSOCIATE JUSTICE,

HON. CLINTON A. GALBRAITH.

ASSOCIATE JUSTICE,

HON. ANTONIO PERRY.

ATTORNEYS GENERAL DURING THE PERIOD COVERED BY THIS VOLUME,

HON. EDMUND P. DOLE.

HON. LORRIN ANDREWS.

HENRY SMITH, Esq., Clerk.

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CASES DECIDED

BY THE

SUPREME COURT

OF THE

TERRITORY OF HAWAII.

**IN THE MATTER OF THE APPLICATION OF HARVEY
R. HITCHCOCK, LAWRENCE H. DEE, HARRY L.
EVANS, CHARLES J. FISHEL, ON BEHALF OF
THEMSELVES AND ALL OTHER STOCKHOLDERS
IN THE KAMALO SUGAR COMPANY, LIMITED,
FOR A WRIT OF MANDAMUS AGAINST HONOR-
ABLE A. S. HUMPHREYS, FIRST JUDGE OF THE
CIRCUIT COURT OF THE FIRST CIRCUIT.**

ORIGINAL.

SUBMITTED JANUARY 9, 1902. DECIDED JANUARY 13, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

**An order of this court remanding an equity cause to a Judge of the
Circuit Court with direction to receive evidence on an issue raised**

by amended pleadings filed after the close of the original hearing before said Judge, and in support of which evidence was offered and rejected, does not direct a "new trial" and is not within the inhibition of Sec. 84 of the Organic Act disqualifying a Judge from sitting "on an appeal, or new trial, in any case, in which he may have given a previous judgment."

OPINION OF THE COURT BY GALBRAITH, J.

A petition and application was presented to this court for a peremptory writ of mandamus against the First Judge of the First Circuit Court commanding him to proceed with the hearing of a certain suit in equity remanded to him for further proceedings by order of this court. An order to show cause was issued returnable the first day of the present session. The respondent appeared and interposed a demurrer alleging that the petition does not state a cause of action.

It is alleged in the petition that the petitioners are the plaintiffs in a suit heard by the said First Judge of the First Circuit Court; that from the decree rendered therein an appeal was perfected to this court and a decision rendered November 8, 1901, (13 Haw. pp. 641 to 654) wherein the decree appealed from was reversed and said cause was remanded to "the Judge of the Circuit Court of the First Circuit with instructions to receive such evidence as may be offered under the amendments to the pleadings and for such further proceedings consistent with the foregoing views as may be proper;" that the respondent set said cause for hearing in pursuance of the direction of said mandate; that on the day set for the hearing the respondent suggested his disqualification and want of jurisdiction to hear said cause and after argument decided against his jurisdiction and declined to proceed; that there is no other Judge of the First Circuit Court now in said circuit except the respondent; that his refusal to proceed with the hearing is a denial of a clear, legal and existing right and one that cannot be enforced in any other manner than that sought in this proceeding.

The respondent, it appears, declined and refused to act in the premises on two grounds: (1) that it was not clear that this court intended to remand the cause to the First Judge of the First Circuit Court; (2) that under the provisions of Sec. 84 of the Organic Act of the Territory he was disqualified and had no power to proceed.

It is an answer to the first objection to state that there is no doubt in the mind of the members of this court as to the intention of the mandate and that said cause was remanded to the respondent for further hearing. This intention clearly appears from the opinions filed in the cause and the ground on which the ruling of the court was based. The fact that the attorneys for the defendants in the equity suit did not raise the objection to respondent proceeding to hear the cause is a strong inference that they understood the real intention of the court in remanding the cause.

The provision of the Organic Act that is claimed to disqualify the respondent reads: "No judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment."

It is contended that the mandate directs a new trial of the cause and that the respondent having rendered a previous judgment, i. e., the one appealed from in that cause, he has no power to proceed as directed in the mandate. The language of the Organic Act is plain, unambiguous and mandatory. No judge can sit on a new trial of any case wherein he has rendered a previous judgment. If the mandate directs a *new trial* then the contention of the respondent is correct and he is without jurisdiction and cannot proceed.

It is contended for the petitioners that the mandate does not require or contemplate a new trial but only directs the completion and perfection of the trial had at the former hearing—the hearing of evidence on new issues raised by the amended pleadings and not a rehearing of the issues on which evidence was received; that the decree appealed from was not heard on its merits; that it was reversed on a motion based on the ground

that the trial had not been complete and that the term "new trial" in the legal and technical use of the term is never applied to equity cases and that for this reason the disqualification of the Organic Act does not apply to this case.

A trial is defined as "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue."—*Bouvier's L. D.* A new trial is "a re-examination of an issue in fact before a court and a jury, which has been tried at least once before the same court."—*Bouvier's L. D.*

A reading of the opinions referred to will show that the cause was remanded not "to retry" an issue or issues that had been tried by the respondent but to try an issue that he had refused to try; that a retrial of the entire cause was not contemplated nor expected by either the court or counsel employed in the cause and that a trial—the examination—of a fact or facts put in issue by the amended pleadings was all that the mandate directs. The fact that the decree appealed from was reversed and another decree must be rendered at the conclusion of the hearing does not militate against this purpose of the court for the reason that it was necessary to reverse the decree in order that the cause might be reopened for a further hearing on the new issue raised by the amended pleading filed and allowed after the hearing had concluded. Another decree, either in the same form or in different form and substance covering all of the issues tried will be necessary at the close of the hearing directed.

We conclude that a *new trial* was not ordered or contemplated and that the respondent is not disqualified under Sec. 84 of the Organic Act from hearing the cause as directed by the mandate.

We do not deem it necessary in this cause to pass upon the question raised and discussed at the hearing as to whether or not the phrase "new trial" is at any time applicable to causes in equity.

Let the demurrer be overruled and the writ issue as prayed in the petition.

G. A. Davis, J. A. Magoon, T. McCants Stewart and F. M. Hatch for petitioners.

Kinney, Ballou & McClanahan, Robertson & Wilder and F. W. Hankey for respondent.

CHOY LOOK SEE v. ROYAL INSURANCE COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED DECEMBER 6, 1901. DECIDED FEBRUARY 6, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The words "to be occupied," in the description of a building in an insurance policy, do not constitute a waiver of a provision that the building should not remain unoccupied beyond a limited period.

Knowledge by the insurer at the inception of the contract that a building was then unoccupied would estop it from afterwards setting up the fact of nonoccupancy however long continued, if the policy forbade nonoccupancy altogether; but it would not estop it from setting up the fact that nonoccupancy continued beyond a limited period if the policy permitted nonoccupancy for that period.

A policy covering two buildings is indivisible and therefore void as to both buildings if void as to one, when it is given for an indivisible consideration, and when by its terms the "entire policy" is to be void in case of a breach of condition as to "a building" described therein, and when the buildings are so situated with relation to each other as to constitute practically one risk, and perhaps it would be void irrespective of such relative situation.

Under our practice judgment *non obstante* may be ordered for the de-

defendant as well as for the plaintiff and on the evidence as well as on the pleadings when the facts are undisputed.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

This is one of many insurance cases arising out of the burning of "Chinatown" in the city of Honolulu on January 20, 1900. The policy is for \$1000 upon two buildings, one on the East corner of Beretania and River streets, the other on the same side of River street 60 feet from the same corner. The fire spread to these buildings from other buildings which had been set on fire by order of the Board of Health because of infection by bubonic plague. See *Wong Chow v. Trans. Fire Ins. Co.*, 13 Haw. 160 and *Haw. Land Co. v. Lion Fire Ins. Co.*, *Id.* 164.

The jury found for the plaintiff in the full amount of the policy. The case comes here on numerous exceptions, including exceptions to the rejection of evidence, to the refusal to order a non-suit, to the giving and refusing to give to the jury various instructions, and to the denial of a motion for a new trial. The principal questions raised are: (1) Whether the defendant is estopped from setting up a forfeiture based on the facts that the buildings were on ground not owned by the insured in fee simple and (2) that one of the buildings was unoccupied at the time of the insurance and so remained for ten days and more; and (3) whether the wind or the order of the Board of Health was the proximate cause of the fire. It will be sufficient to pass upon the second only of these questions.

One of the buildings was unoccupied at the time the insurance was effected and remained so until the fire occurred seventeen days afterwards. The policy provided, among other things, that,

"This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void * * * if

a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

It provided also that,

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

There is no agreement indorsed on or added to the policy, as required by its terms, to the effect that one of the buildings might remain unoccupied indefinitely. Indeed, the only reference to the matter of occupancy of the building in question, outside of the printed terms of the policy above quoted, is that contained in the words "to be occupied," found in the type-written description of the building. But these words, it goes without saying, rather require the building to be occupied than permit it to remain unoccupied. And so counsel do not contend that there has been a waiver in accordance with the terms of the policy. They contend that the defendant is estopped from setting up the fact that the terms of the policy have not been complied with.

The only fact relied on to show estoppel is that the insurer knew, through its agent, at the time the policy was issued, that the building was unoccupied. This no doubt would work an estoppel if the provision of the policy were that it should be void if the building should be or become unoccupied at all. There is a distinction between a waiver of a breach which occurred or knowledge of which was acquired after the inception of the contract, and an estoppel by reason of knowledge at the outset of facts which by the terms of the policy would otherwise render it void. In the former case a valid contract would have been

entered into, by the terms of which the parties would be bound afterwards, while in the latter case the insurer would have accepted a premium for a policy which it knew at the time was void and so would perpetrate a fraud, unless it were held estopped. Accordingly it is held that the insurer cannot rely on a failure to indorse on the policy as required by its terms a non-compliance with its provisions, when it had knowledge of such non-compliance at the time it accepted the premium and delivered the policy. There is, it is true, much to be said in support of the opposite view, but the view we adopt seems to be more in accord with justice and to have the better support in authority. Perhaps as clear and forcible statements of the two views as can be found are those of the majority and dissenting opinions in the recent case of *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 101 Fed. R. 77, decided by the United States Circuit Court of Appeals for the Eighth Circuit, in accordance with the view we have taken, under a policy which contained the identical strict provisions of the policy now in question. See *Lewis v. N. Y. Life Ins. Co.*, 4 Haw. 305, 370.

But the foregoing reasoning has no application to a case like the present in which nonoccupancy is not forbidden altogether but on the contrary is permitted for a limited period. The reason why nonoccupancy cannot be relied upon as a defense, notwithstanding the terms of the policy, when the insurer has knowledge of that fact at the time and the policy does not permit any vacancy at all unless so agreed by indorsement, is that the insurer would otherwise perpetrate a fraud by accepting the premium for a policy known to be void at the time. But this reason obviously has no application where nonoccupancy for a time is permitted by the terms of the policy itself, for in such case the policy is valid at its inception and continues so until a breach of one of its conditions, and it is immaterial that the condition, the subsequent breach of which is relied on, is that relating to occupancy. In this case, the policy was to be void if a building described therein should "be or become vacant or unoccupied and so remain for ten days." The policy itself

contemplated vacancy either at the time or afterwards and permitted this to continue for any period less than ten days. It was immaterial whether the insurer knew of the vacancy at the time or not. The policy was valid at its inception and would so continue, so far as this condition was concerned, if the insured did not commit a breach by permitting the vacancy to continue for a period longer than that permitted by the policy. The case might perhaps be different if the circumstances were such that the insurer knew not only that the building was unoccupied at the time but also that it could not be occupied within the time limited by the policy, as, for instance, that it was in course of erection and could not be completed so as to be fit for occupancy within that time. The evidence, however, shows a different state of facts. The testimony of the plaintiff's husband who acted for her in the matter, was that the clerk who acted for the defendant, first asked, when soliciting the insurance, if he (the witness) had completed the building, saying that he (the clerk) wished to insure the place, and that he (the witness) replied "Very well." He testified also that the building was then completed except that some carpenter work about the windows and some painting remained to be done and that, "if a party had rented it, it was ready for occupancy," on the day the policy was issued. The policy itself also shows, as stated above, that there was no intention to waive the requirement of occupancy altogether or indefinitely, for it describes the building in question as "to be occupied." There are, it is true, cases that have not distinguished in regard to this point between policies which forbid nonoccupancy altogether and those which permit it for a limited time, but they are cases in which, if there were not other facts to distinguish them from the present case, the courts did not notice the distinction or give any valid reasons for failing to observe it. The latest case that has come to our attention on this point is *Moore v. Niagara Fire Ins. Co.*, 199 Pa. St. 49 (48 Atl. 869). In that case, the court after careful consideration of the whole question and a review of the authorities, came to the conclusion that there was no estoppel from a knowl-

edge of nonoccupancy at the time, under a policy like that now under consideration. See also *England v. Westchester Fire Ins. Co.*, 81 Wis. 583; *Thomas v. Hartford Fire Ins. Co.*, 21 Ky. L. Rep. 1139 (56 S. W. 264); *Conn. Fire Ins. Co. v. Tilley*, 88 Va. 1024 (14 S. E. 851). It follows, therefore, that the policy was void as to the unoccupied building at least.

The policy being void as to the unoccupied building was void as to the other building also. This too is a proposition in regard to which there is an irreconcilable conflict of authority. The language of the policy would seem at first glance to be clear enough. "This *entire policy* * * * shall be void * * * if a building herein described * * * be or become vacant or unoccupied and so remain for ten days." There are several classes of cases upon this point. Some courts hold that although, as in this case, the consideration is entire, that is, the premium is a gross sum and the amount of insurance is also a gross sum and the provision is that "this policy" or "this entire policy," &c., shall be void, the mere fact that the amount of insurance is distributed by the terms of the policy among the various items insured, is sufficient to show that the contract is severable or divisible and that its being void as to one item does not affect its validity as to the other items. They hold this even though the items are so related that the burning of one would in all probability result in a destruction of the other, as where the items are a building and the goods in the building. In some cases an attempt is made to justify such ruling by the statement that the insurance might have been effected by separate policies on the respective items, in which case the voidance of one policy would not affect the other, and that the insured ought not to suffer because for convenience all the items have been included in one policy. This of course assumes that the insurance could have been effected on the respective items separately at the same rate, which is no doubt true in some cases and not true in other cases. A larger number of courts hold that under terms like those in this policy and especially in view of the fact that the consideration is entire, the contract is not

divisible. They say that even if the insurance could have been effected in different policies at the same rate, yet this was not done; that the parties have made their contract; that it should be construed by the same rules that are applicable to other contracts; that the court cannot make a different contract for the parties; and that the object of distributing the amount among the different items is to limit the amount to be recovered in respect of each item and not to make the contract severable. A third class of courts, in an effort to effect justice, take a middle course and hold the contract to be entire where the items insured are so related that the burning of one would endanger the others, and divisible where they are not so related. No doubt policies of insurance should be construed strictly against the insurer and liberally in favor of the insured, but this rule applies in cases of doubt. It does not mean that policies should be given meanings which their language cannot reasonably bear or that insurers have no rights or that the terms of valid contracts should not be enforced though they may appear to be harsh. It would in our opinion be in violation of established principles of law and recognized principles of justice, to adopt the first of the above views and hold that the contract was severable under the circumstances of this case irrespective of the question whether the burning of the one building would endanger the other. Even if, in an effort to hold the insurance company liable, assuming that such an effort should be made, we should adopt the middle ground above referred to and hold that as matter of law the contract would be divisible in case the burning of one building would not endanger the other, the facts would not support us. The buildings were both shingled-roof frame buildings, built for stores on the ground floor and dwellings on the other floors. The occupied one (upon which there was insurance for \$250 under this policy and for \$500 under another policy) was a two story building. The unoccupied one (upon which there was insurance for \$750 under this policy) was a three story building. The latter building was next to the former. And as already stated the two were owned by the

same person who had insurance on both buildings. Under these circumstances it could hardly be claimed that the burning of the three story building would not endanger the other or that a fact—nonoccupancy—which would increase the risk as to one would not increase it as to the other. Numerous cases upon this subject are cited in 28 Century Digest, 954 *et seq.* One of the strongest of the recent cases supporting the view that the contract is divisible is *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75. Cases taking the middle ground, that the contract is entire or not, according as the items insured are so related as to constitute in fact one risk or not, are collected in the note to *Wright v. Fire Ins. Ass'n*, 19 L. R. A. (Mont.) 211. A recent decision by a court of high authority holding that the contract is entire from the fact that there was but one premium is found in *Thomas v. Commercial Un. Ass. Co.*, 162 Mass. 29. One of the latest and most carefully considered decisions to the same effect that has come to our notice is that in the case of *So. Ins. Co. v. Knight*, 111 Ga. 622 (52 L. R. A. 70) from which we quote the following:

“The policy sued on in the present case insured both the stock of goods and the building in which it was contained. The premium due upon the policy was a gross sum. The question arises therefore, whether the breach of a warranty relating solely to the goods, and which precluded a recovery for their loss, would also bar a recovery for the loss of the building. The stipulation prescribing that the insured must take an inventory of his stock provides that in case of failure so to do ‘this policy shall be null and void.’ What was the intention of the parties with respect to the question just above stated? If this intention is to be derived from the language used,—and it must be,—it would seem to be clear that the contract was entire and indivisible, and that the breach of a condition which would work a forfeiture would avoid the entire policy, and not simply a portion thereof. The parties contracted that ‘the policy’ should be void in case of failure to comply with the iron-safe clause. The policy embraces insurance upon both the building and its contents, and the premium is payable in a gross sum. ‘If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may con-

sist of several distinct and wholly independent items.' 2 Parsons, Contr. 519. It was competent for the parties to make two separate and distinct contracts, one covering the goods, and the other the building, but they did not see proper to do this. They combined the two, and made the consideration moving towards the insurer a gross sum. They further provided that the contract—not a part of it—should be void under certain conditions. It may perhaps seem to be unreasonable that, simply for a failure to take an inventory of the stock of goods, the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, What have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things, and he has failed to comply with his agreement. In such a case there is but one thing for the courts to do, and that is to enforce the agreement as made. The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy, if the contract so provides. Text writers of great learning and ability have, after reviewing the decisions on both sides of this question, reached the conclusion that the contract is indivisible. We quote the following from 1 Wood, Fire Ins. p. 384: 'It is difficult to understand how it can be held that these contracts are several, when a gross premium is paid for the entire insurance. The court cannot say, as a matter of law, neither can the fact be shown, that the insurer would have been satisfied to take the risk separately at the same premium. By consenting to pay a gross premium for the insurance, the assured has signified his willingness to let the policy stand as an entire contract, subject in all its parts to the conditions imposed by the insurer; and there is neither reason nor equity in permitting the assured, after he has violated one of the conditions of the policy as to a part of the risk, to turn around and say that the condition only affected that portion of the risk

to which the breach related.' Mr. Ostrander, after an elaborate review of the decisions, reaches the conclusion that those which hold the contract to be entire announce the sounder and better rule. Ostrander, Fire Ins. §23 *et seq.* See also 2 Joyce, Ins. §1931; 1 May, Ins. §277. In support of the views herein announced, we find the courts of last resort of Maine, Wisconsin, Maryland, Minnesota, Virginia, New Hampshire, Massachusetts, Vermont, Pennsylvania, New Jersey, Michigan, Indiana, Arkansas, Iowa, Alabama, and Connecticut. * * * Opposed to this view are decisions of the courts of last resort of Nebraska, Colorado, Kansas and Missouri. * * * The courts of New York and Indiana seem to have been at different times on both sides of the question now under consideration. * * * Our conclusion is that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have connection with but one of these classes."

It may seem hard to hold that the breach of the condition as to occupancy avoids the policy although it in fact had nothing to do with the burning of the property. But such was the contract made by the parties themselves. It was competent for them to make such a contract and the court must give it effect. The insurer might have extended the period of nonoccupancy if the insured had applied for an extension, but whether it shall now waive or rely on the breach is not for the court to say. That the breach may be relied on under the terms of the policy although it did not contribute to the loss is well settled. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452.

Under the practice established in this jurisdiction judgment *non obstante veredicto* may be ordered for the defendant as well as for the plaintiff and on the evidence as well as on the pleadings when the facts are undisputed. See *Estate of Kamaka*, 9 Haw. 245. This was done in an insurance case in *Lewis v. N. Y. Life Ins. Co.*, 4 Haw. 305. The facts are undisputed in the present case so far as the question of occupancy

is concerned. The trial judge should have directed a verdict for the defendant.

The exceptions are sustained, the verdict set aside, and the case remanded to the Circuit Court with directions to order judgment for the defendant *non obstante veredicto*.

Magoon & Thompson and *Hatch & Silliman* for plaintiff.

Robertson & Wilder and *L. A. Thurston* for defendant.

DISSENTING OPINION OF GALBRAITH, J.

One of the alleged errors presented by the defendant's bill of exceptions was the ninth instruction wherein the court charged the jury as follows: "The jury are instructed that the company having written upon the face of its policy that one of the buildings was occupied and the other to be occupied, constitutes a waiver of any claim of forfeiture by the company on the ground that the building referred to in the second clause of the typewritten matter upon the face of the policy was unoccupied for more than ten days."

The question presented by this exception is, Did the court correctly state the law?

The defendant contracted to indemnify the plaintiff for the term of one year from noon of the third day of January, 1900, to noon of January 3, 1901, against all direct loss or damage by fire, except as otherwise provided in the contract, to an amount not exceeding one thousand dollars to the property described. On a typewritten slip pasted to the face of the policy was the following:

"Choy Look See.

One thousand dollars as follows:

- \$ 250.00 On the two-story frame shingled roof building, occupied by tenants as retail stores and dwellings situate on the east corner of Beretania and River streets, Honolulu, H. I., Block 10.
- \$ 750.00 On the three-story frame shingled roof building, to be occupied as stores and dwellings, situate on the

east side of River street about 60 feet from the corner of Beretania and River streets, Honolulu, H. I.

\$1000.00 Other insurance, Scottish Union on this one \$500. This slip is attached to and made a part of Policy No. 513612, issued by the Royal Insurance Co. of Liverpool."

This was signed by defendant's agent. The evidence shows that this item No. 2 described in part "to be occupied" was a new building nearing completion; that some work (how much does not appear) was necessary to finish the painting and windows; that the plaintiff did not understand English and talked to the defendant's agent through an interpreter; that the defendant solicited the insurance and when plaintiff called for the policy it was written and ready for delivery. It nowhere appears that the policy was translated or explained to her or that she understood its terms and conditions other than that she thought that she had a contract of indemnity from loss by fire on her property for a period of one year; that 17 days after the policy was delivered the property was burned by a fire that was started by order of the Board of Health in its crusade against the alleged epidemic of bubonic plague. It is also a matter of common knowledge that the policy was written at a time after it was widely circulated and generally believed that a plague epidemic was raging in Honolulu, and that the property insured was located in the part of Honolulu known to be the center of the infected district.

It is clear from the terms of the policy that it was not the intention or wish of the company to insure vacant or unoccupied buildings unless the fact of vacancy was made known to it, and that the clause in the policy permitting a vacancy for ten days was placed there to cover necessary and incidental vacancies occurring in changing tenants or occupants. It is equally clear in this instance by the words used in the typewritten slip that the company knew at the time the contract was executed by the delivery of the policy that one of the buildings insured was a new building and had never been occupied and was then a vacant and unoccupied building and as such it was insured.

This building could not "become vacant or unoccupied;" it was then both vacant and unoccupied.

Was it the intention of the defendant to waive this vacancy clause by writing the insurance on a vacant and unoccupied building? And was this purpose and intent evidenced and demonstrated by writing in the slip "to be occupied?" It surely did not mean that the building should be occupied within ten days, for if that was the meaning these words were useless and meaningless, for the printed clause would mean that without these added words. The majority treat these words "to be occupied" as ornamental surplusage, or as though they had not been written there. This is clearly wrong. Those are not idle words. There was some reason or purpose in writing them. What was that purpose? In determining the question resort should be had to the well established and recognized rules for the interpretation of contracts in general and insurance contracts in particular.

The safe rule for guidance in this matter was announced by the Circuit Court of Appeals, Fifth Circuit, in a recent decision as follows:

"Conditions for forfeiture in the printed forms of insurance policies now in general use have been prepared by the insurance companies with studious care, and should be strictly construed against the insurer, and liberally in favor of the insured, when invoked by an insurance company to limit or avoid liability. No intendment will be indulged to limit or avoid its liability." *Penn. Fire Ins. Co. v. Hughes*, 108 Fed. R. 497, 550.

This rule has been followed and approved by the Supreme Court of the United States. *London & Liverpool & Globe Ins. Co. v. Kearney*, 180 U. S.

If no intendment is to be indulged in favor of the company to aid or avoid its liability then it is clear that the use of the words "to be occupied" must be taken as an expression of intention to waive the vacancy clause by the defendant.

There is another reason why the defendant should be held to have waived this vacancy clause and to be estopped from claiming a forfeiture on its account. Under the law the plaintiff

is presumed to know and understand the contents of the policy although it is written and printed in a language she did not understand and it does not appear that its terms were interpreted or explained to her. Certainly the same presumption is binding on the defendant and if it did not avail itself of the rights reserved for its benefit, it should now be estopped from claiming a forfeiture. The policy provides that the company may terminate it by giving five days notice, also "if this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium." If as contended by the defendant the policy became void by reason of the building having remained unoccupied for ten days, it "became void or ceased" on the 14th day of January, six days before the fire. Was not the defendant bound under the terms of the policy to return to the plaintiff or tender to her the unearned premium and demand the surrender of the policy? It seems to me that the provision of the policy above quoted was imperative and demanded action on the part of the defendant provided it did not wish to waive a forfeiture on the grounds of vacancy and unoccupancy. Having failed to act or claim a forfeiture, although there was ample opportunity for doing so, until after the fire surely fair dealing and common honesty would demand that it be denied the privilege of now claiming the forfeiture. (*Moore v. Niagara Fire Ins. Co.*, 199 Pa. St. 49; 48 Atl. 869 at p. 872.) There was no error in the ninth instruction and the exception should be overruled.

On another proposition my opinion is at variance with that of the majority, i. e., whether or not the contract was entire or divisible. As is said in the majority opinion there is on this question "an irreconcilable conflict of authority."

There is one view of the question that might be added to those cited in the opinion, i. e., that presented by the Supreme Court of

Arkansas holding that where the consideration was a gross sum and several buildings were insured for separate amounts the contract was entire and not separable; that if one of the buildings were occupied and the other vacant the terms of the policy were satisfied and the insured could recover the full amount of the loss. *McOneeny v. Phoenix Ins. Co.*, 52 Ark. 257 (5 L. R. A. 744).

The Supreme Court of New York says: "Whatever the rule may be elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid and the amount insured is the sum total of the valuation." *Pratt v. Ins. Co.*, 130 N. Y. 206.

The Supreme Court of Missouri said relative to the words "this entire policy shall be void," etc.: "The addition of the word 'entire' given its utmost latitude, could not avoid any more than the whole policy, hence it added nothing to the policy. Forfeitures are not favored in the law and will not be enforced if any reasonable interpretation can be made which will prevent it. No reason is given here why a forfeiture should be enforced, except the insertion of the word 'entire' into the policy."
* * * Holding, then, as we do, that this was a divisible contract, it results that the legal effect is the same as if two distinct and separate policies were issued, and so reading the contract, we do not reject the word 'entire' at all, but apply it to that policy or portion of this policy which the insured has forfeited by the change of title, to which alone this clause refers, and it avoids that 'entire' policy, and not the policy in which no condition or warranty has been broken. This construction logically follows from the divisibility of the contract, and best accords with fair dealing, and the presumed intention of the parties." *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 86.

The Supreme Courts of Ohio, Indiana, Kansas, Kentucky, Nebraska and Virginia agree with that of New York and Missouri, that an insurance contract like the one under consideration is severable.

Coleman v. New Orleans Ins. Co., 49 Oh. St. 310; *Continental Ins. Co. v. Chew*, 11 Ind. Appeal 330; (38 N. E. 417); *German Ins. Co. v. York*, 48 Kan. 488 (29 Pac. 586); *Phoenix*

Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; *Conn. Fire Ins. Co. v. Tilley*, 88 Va. 1024 (14 S. E. 851).

These questions are before this court for the first time and the law in this jurisdiction is to be now announced and the proper rules of interpretation to be applied to insurance policies are to be determined. The decisions of the state courts are at variance and conflicting but in the federal courts a uniform rule seems to have been adopted and followed, at least by the Circuit Court of Appeals for the Fifth Circuit, and the United States Supreme Court. These rules it seems to me are mandatory and controlling in this court. If policies are to be most strictly construed against the insurer, and forfeitures are not to be favored and no intendment are to be indulged to limit or avoid the liability of the insurer, the conclusions I have reached on the two questions discussed cannot be avoided. (1) The defendant must be held to have waived the forfeiture on account of nonoccupancy; (2) and even if it did not waive the right to claim a forfeiture on this account, the policy is severable and the vacancy of one of the buildings does not bar the right to recover the value of the other, i. e., the one that was occupied at the time of the loss.

GEORGE E. BOARDMAN *v.* FIREMAN'S FUND INSURANCE COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 14, 1901. DECIDED FEBRUARY 7, 1902.

GALBRAITH AND PERRY, JJ., AND C. BROWN, ESQ., OF THE BAR,
IN PLACE OF FREAR, C.J., DISQUALIFIED.

A fire insurance policy, issued "in consideration of the stipulations" therein named and of the payment of the premium, provided, among other things, that "if fire occur, the insured shall give immediate notice of any loss thereby in writing to the company * * * and, within sixty days after the fire, unless such time is extended in writing by this company, render a statement to this company, signed and sworn to," etc., (such statement being what is commonly known as "proofs of loss") and further provided that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Held, that the rendering of the statement in question *within sixty days* after the fire, is a condition precedent to the right of action and that, in the absence of a waiver, a failure to render such statement within the time specified bars a recovery under the policy.

B., a clerk in the employ of the local agent of the insurance company, made to the plaintiff, when the latter gave notice of claim for the amount of the insurance, oral statements to the effect that the company would not pay the amount of the loss. The policy provided that no agent of the company, except an officer thereof, should have power to waive or be held to have waived any of its provisions, unless such waiver be in writing upon or attached to

the policy and that no act or statement of any officer or agent should operate as an estoppel on the company unless in writing endorsed upon the policy.

Held, that the oral statements of B. did not constitute or operate as a waiver of the requirement as to the filing of proofs of loss.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

This is an action on a policy of insurance for \$7000 issued by the defendant on the dwelling-house and outbuildings of the plaintiff on the premises bounded by Lunalilo, Kapiolani and Kinau streets, this city. The property insured was wholly destroyed by fire on the 21st of January, 1900, by order of the Board of Health after condemnation by that body as being infected with bubonic plague. The case was tried before a jury and a verdict rendered for the plaintiff for \$7000. The defendant comes to this Court with a number of exceptions, not all of which, however, need be considered.

The defendant excepted to the admission, against objection, of certain evidence offered by the plaintiff to prove oral statements made by one Berg, a clerk in the employ of Bishop & Co., the defendant's local agents, to the plaintiff on an occasion when the latter with his attorney called at Bishop & Company's office to give notice of claim for the amount of the insurance. These statements were to the effect that the insurance company would not pay the insurance. Defendant also excepted to the refusal of the court to direct a verdict for the defendant on the ground, among others, that proofs of loss were not presented within the time required by the terms of the policy and that no sufficient excuse in law for a failure to present them within the time mentioned in the policy had been shown, and to the modification by the court of an instruction requested by the defendant on the subject of proofs of loss, by which modification it was left to the jury to determine whether or not there had been a waiver by the company of the requirements of the policy concerning the filing of such proofs.

The evidence shows beyond doubt that proofs of loss were not filed until March 29, 1900, more than sixty days after the fire. The requirement of the policy is that such proofs be filed within sixty days after the fire. The only excuse suggested for the failure to present the proofs within the sixty days is that during all of said period the plaintiff, by reason of the death of a member of his family and the loss of his property and for other causes, became ill and mentally incapacitated to such an extent that he was unable to attend to his ordinary business affairs. Assuming that these facts, if proven, would constitute a sufficient excuse in law, we are of the opinion that the evidence adduced was clearly insufficient to warrant the jury in finding that the plaintiff was thus incapacitated. It may be added that the undisputed testimony of one of plaintiff's witnesses shows that on March 16, five days before the expiration of the time limited, plaintiff handed the insurance policy to his attorney for collection and that on the same day the latter gave to Bishop & Co. notice of the loss.

It is contended by counsel for plaintiff that the failure to file proofs within the sixty days can not avail as a defense to this action for two reasons: (a) because it is not provided in the contract that the policy shall become void in case of such failure and the only penalty is that the right to bring an action on the policy is postponed until after such filing, whether before or after the expiration of the sixty days, and (b) because the insurer waived the requirements of the provision in question.

It has been held by some courts that if a policy of insurance provides that proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed and does impose a forfeiture for a failure to comply with other provisions of the contract, the insured may maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy; (see, for example, 4 Joyce Ins. 3282 and *Steele v. Ins. Co.*, 93 Mich. 81) and that to prevent forfeitures, courts

are bound to construe such contracts as strongly against the insurer, and as favorably for the insured, as their terms will reasonably permit. *Vangindertailen v. Insurance Co.*, 82 Wis. 117. The weight of authority, however, is to the effect that such provisions with reference to the filing of notice or proofs of loss within a specified time, must, unless waived, be strictly complied with, not only as to the substance of such notice and proofs but also as to time, that their performance is a condition precedent to the right of action and that a failure to present such notice or proofs within the prescribed time, is, in the absence of waiver, a violation of the provision such as to bar a recovery on the policy. "The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. * * *

The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses." *Riddlesberger v. Insurance Co.*, 7 Wall. 386, 390. See also 2 Wood on Insurance §437; *Owens v. Insurance Co.*, 57 Barb. 521; *Blossom v. Insurance Co.*, 64 N. Y. 162, 165; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 362; *Bank v. Surety Co.*, 87 Fed. 118, 123, 124; *Knudsen v. Insurance Co.*, 75 Wis. 198, 202; *Gould v. Insurance Co.*, 90 Mich. 302, 305; dissenting opinion of Grant, J., in *Steele v. Insurance Co.*, *supra*; *Scammon v. Insurance Co.*, 101 Ill. 621; May, Insurance, §465; Ostrander, Insurance, 2nd ed., §§338, 339, 340, 221, 222, 223; *Bowlin v. Insurance Co.*, 51 Minn. 239. Whether or not in any particular case the filing of proofs of loss within the time specified is a condition precedent to a right of action, depends upon the intention of the parties as disclosed by the language of the contract under consideration. In the contract in the case at bar it is provided: "If fire occur the insured shall give immediate notice of any loss * * * and, within sixty days after the fire * * * shall render a statement to this company, signed and sworn to by said insured," etc., (this statement being what is known as "proofs of

loss"); also, "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." This language is clear and explicit. The filing of proofs of loss *within sixty days* is one of the requirements *full compliance* with which is necessary before an action can be maintained. A filing of such proofs after the expiration of sixty days is not full compliance with the provision. Although there is some authority to support it (see *Steele v. Insurance Co., supra*), the distinction does not appeal to us as being sound which is sought to be drawn between cases where the words "until after" are used, as in that at bar, and those where the word "unless" is used in their stead. In each instance the meaning of the words "full compliance" is the same.

"Almost without exception the courts of this country and England have held that proofs of loss must be furnished as provided by the policy, or the insurer would be discharged. Among jurists and text writers who have been called upon to discuss this question during the more recent period of the evolution of the insurance contract, there has been a consensus of opinion in agreement with this proposition, until we reach the case of *Kenton Insurance Co. v. Downs* (13 S. W. 882, Ky.); and in justice to the Court of Appeals of Kentucky, who heard that case, it is proper that we should mention that, so far as the reports disclose, the policy in that suit did not make its conditions and requirements a part of the consideration, nor does it appear that there was any general clause making the liability of the company to pay a loss contingent upon the performance by the insured of all or any of the requirements concerning proofs."—*Ostrander Ins.* (2) §338.

"Where the consideration for the insurance is in part money and in part the promised performance of the conditions and requirements of the policy, the obligation of the insurer to pay the loss rests entirely upon the performance of such condition and requirements by the insured, and when notice or proofs of loss are required to be furnished within any particular time, as 10, 30 or 60 days, a failure to comply will be fatal. Unless waiver can be shown, a partial performance will not be sufficient.

The money part of the consideration having been paid does not create an obligation on the part of the insurer to pay a loss. It is stipulated that the insured must do certain other things which may be of equal or even greater importance than the payment of the premium. These requirements of the policy may refer to matters affecting the character of the hazard, or to things which the insured is to do subsequent to the loss."—*Ib.* §340.

"When it appears from the language employed that it is the intention of the parties that payment of a loss will depend on the performance of any particular thing by the insured, and when such stipulations and requirements are made a part of the consideration for the promise or engagement of the insurer, there can be no recovery under the policy, unless the insured shows such performance. The question of materiality cannot be raised. That which is required to be done has been made material by the agreement of the parties."—*Ib.*

The promise now sued upon was made as set forth in the policy "in consideration of the stipulations herein named and of one hundred and forty dollars premium." This fact, together with the above quoted provision as to no suit being sustainable until after *full compliance*, etc., bring the case at bar within the principles stated by Ostrander. The requirement as to the filing of proofs *within the time* stated, was made by the parties themselves a material one and a condition precedent to the right of recovery.

The courts which hold that, notwithstanding the time limit expressed in the policy, proofs of loss may be filed at any time before the commencement of the action, do not go to the extent of holding that the *filing* of such proofs is not an essential; they still recognize that such filing is a condition precedent to a right of action. It is merely the *time* which they hold to be immaterial. In the policy in the case at bar, the requirement as to filing within 60 days is accompanied by the qualification, "unless such time is extended in writing by this company." To our minds this language further indicates clearly that it was the intention and understanding of the parties that the time limit could be extended only by the party and in the manner stated, i. e., by the *company, in writing*, and not otherwise. To hold

that an action may be maintained if proofs are filed after 60 days but at any time before the commencement of the action, would be to extend the time against the will of the company and without writing,—something entirely contrary to the expressed agreement of the parties. It would be making a new contract for the parties and this clearly the court can not do.

As to waiver. The only evidence which is claimed to show a waiver is that of the oral statements by Berg to the effect that the insurance company would not pay the amount of the loss. It is not pretended that any communication in writing constituting a waiver, passed from the defendant or any of its agents to the plaintiff or that any officer of the defendant orally or otherwise waived the provision. It is true that it has been held in many cases that a refusal to pay or denial of liability, within the time specified for the filing of proofs, is a waiver of the requirements of such proofs, but those evidently are cases in which the policies contained no limitations on the power of agents to orally waive any of its provisions,—at least, the question of the effect of such limitations does not seem to have been considered or referred to in those cases. In the case at bar, however, the policy contains this provision: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no agent or other representative of this company, except an officer of this company, shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no agent or other representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. No act, or statement of any officer, agent, or other representative,

nor act or statement made by any such officer, agent or representative, shall operate as an estoppel upon this company, or in anywise affect this insurance, or the validity of this policy, unless such act or statement shall be by this company in writing endorsed upon this policy." That such a stipulation may be entered into by the parties to a contract of insurance, is well settled. *Cleaver v. Insurance Co.*, 65 Mich. 527, 532; *Gould v. Insurance Co.*, *supra*; *Gladding v. Insurance Association*, 66 Cal. 6, 8; *Knudson v. Insurance Co.*, 75 Wis. 203; *Kyte v. Assurance Co.*, 144 Mass. 43, 46. The insured, as well as the insurer, is bound by the terms of the contract. He has express notice that the agent is without power to waive except in writing and should govern himself accordingly. See cases last cited; also *Hankins v. Insurance Co.*, 70 Wis. 5, 6; *Insurance Co. v. Coos County*, 151 U. S. 452, 462, 463. To hold that what Berg orally said to plaintiff, whether such statement is designated a denial of liability or whatever else, constituted a waiver or estoppel, would be to render the provision last quoted useless and nugatory and to make a new contract for the parties.

The only theory upon which the verdict of the jury can be explained is that they found that defendant waived the requirement in question. Such finding was without evidence to support it.

Under the practice established in this jurisdiction judgment *non obstante veredicto* may be ordered for the defendant as well as for the plaintiff and on the evidence as well as on the pleadings when the facts are undisputed. See *Estate of Kamaka*, 9 Haw. 245; *Choy Look See v. Royal Ins. Co.*, just decided by this court, *ante*, p. 5. The facts are undisputed in the case at bar so far as the questions of the filing of proofs of loss and of waiver are concerned. On the undisputed evidence on these points, a verdict should have been directed for the defendant.

The exceptions considered are sustained, the verdict set aside and the case remanded to the Circuit Court of the First Circuit

with directions to enter judgment for the defendant *non obstante veredicto*.

Andrews, Peters & Andrade for plaintiff.

Hatch & Silliman for defendant.

DISSENTING OPINION OF GALBRAITH, J.

I do not agree with the conclusion of the majority of the court that the failure to furnish "proofs of loss" within sixty days after the fire was a bar to plaintiff's recovery on the policy. Conceding that this conclusion has the support of some text writers of more or less prominence and of some courts of respectable authority, I do not think that the circumstances connected with the loss in question or the ends of justice, call for a too literal interpretation of this contract of insurance.

The record shows that on the "suspicions" of two physicians the Board of Health declared the subject of the insurance to be infected with bubonic plague, dispossessed the plaintiff, and carted him away to another part of the city and confined him in strict quarantine for a period of fifteen days and while so confined burned his property to the ground; that for a considerable period after his release from quarantine the plaintiff was incapacitated from transacting business, so much so that his lawyer and friend refused to write his will for him; that fifty-five days after the fire the plaintiff gave "immediate" notice to defendant's agent of the loss and ten or twelve days later filed the "proofs of loss" required by the policy; that while one of the grounds on which the defendant resists payment is the failure to file the proofs within the 60 days specified in the policy, the principal ground relied on is one that is declared by the policy to render it void, i. e., a "change of possession" in the subject of insurance.

It seems to me that the acts of the plaintiff were a "full compliance" with this provision of the policy, although not a strict literal compliance.

It should not be overlooked in construing this contract that

it was prepared by the insurance company and its language and terms are those of the company and that those skilled in the business—persons who fully understand the use of the English language and are capable of expressing their meaning and intent in clear and unambiguous terms—are the authors of the contract.

The policy in suit sets out three kinds of things, any one of which happening, renders the policy absolutely void and then specifies fourteen other kinds of things any one of which if it happens and an express waiver in writing is not shown by a duly authorized person, renders the policy null and void. The failure to furnish "proofs of loss" within 60 days after fire is not included in any one of these classes. The language under consideration is as follows: "If fire occurs the insured shall give immediate notice of any loss * * * and, within sixty days after the fire, unless such time is extended in writing by the company, shall render a statement to this company signed and sworn to by the insured stating the knowledge and belief of the insured as to the time and origin of the fire," etc. No penalty is mentioned for failure to give "immediate" notice of the loss and to furnish the proofs of loss within 60 days after the fire unless the clause at the end of the policy providing that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire," can be said to be a penalty. It is at least doubtful whether or not this clause last quoted was so intended. I feel clear that the doubt ought to be resolved in favor of the insured. If it had been intended that a failure to furnish the "proofs of loss" within 60 days after the fire should work a forfeiture of the plaintiff's right to recover, it would have been so easy for the company to have added another to the fourteen kinds of things that rendered the policy void and to have left no doubt in the mind of any one as to the effect of a failure to render the proofs within the time specified. The conclusion of the majority gives

this provision the same effect as if the company had placed it among the things rendering the policy void unless waived. I insist that such a construction is unreasonable and unwarranted by the better authorities.

"If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action on the policy. And this has been held to be true even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof." 4 Joyce, Ins., Sec. 3282.

The Supreme Court of Michigan in construing the identical language under consideration said: "This latter provision clearly refers to such requirements in the policy as relate to the notice of loss, and its evident intent is to provide that no suit can be maintained unless commenced within one year, and in no event until after compliance with such requirements. The use of the words "until after" distinguishes this case from *Gould v. Ins. Co.*, 90 Mich. 302, and brings it within the rule laid down in *Tubbs v. Ins. Co.*, 84 Mich. 646. The effect of misstatement, of changed condition, and contingency, of omission and commission, of fraud and false swearing, is explicitly declared in each other paragraph in which the act, omission or contingency is referred to even the effect of false swearing in the proofs of loss is specifically declared; but the paragraph relating to proofs of loss suggests no penalty. This omission in an instrument replete with clear and explicit declarations of forfeiture is worthy of note. The presence of the declaration of forfeiture in every other instance, and its absence in this, is clearly not an oversight. Time is not made the essence of the provisions relating to proofs, and in the paragraph relied upon by the defendant the words "until after" import order or sequence rather than

the intent to make performance within the time specified the essence of the requirement. The selection of this phraseology seems to me inconsistent with such a purpose. The language has reference to the thing to be done before suit brought rather than the time within which it is to be done." *Steele v. Ins. Co.*, 93 Mich. 83. The same doctrine is reaffirmed in *Reynolski v. Ins. Co.*, 96 Mich. 395. This same construction has been adopted in Wisconsin, *Vanquidertaelen v. The Phoenix Ins. Co.*, 82 Wis. 112, and in Minnesota by a decision rendered June 30, 1901. *Mason v. St. Paul Fire & Marine Ins. Co.*, 85 N. W. R. 13, and in Texas, *Sun Mutual Ins. Co. v. Mattingly*, 77 Tex. 162, and in Kentucky in *Orient Ins. Co. of Hartford, Conn. v. Clark*, 59 S. W. R. 863. In this Clark case the Supreme Court of Kentucky after stating that it had frequently decided that proofs of loss were not a condition precedent to recovery on an insurance policy said relative to the Downs case which is patronizingly criticised by a text writer quoted in the majority opinion: "This question was fully considered in *Ins. Co. v. Downs*, 90 Ky. 236 (13 S. W. 882). And it was there held that where a policy of fire insurance prescribed the various acts or causes which shall work a forfeiture of the policy, and omitted to provide that the failure to furnish proofs of loss within the time required by the policy should operate as a forfeiture, it was sufficient if proofs of loss were furnished before suit was brought; that the court would not imply a forfeiture on account of the failure to furnish proofs of loss within the time prescribed," p. 864. Four other cases from the same court are cited in support of this construction. See also to the same effect *Coventry Mutual Life Stock Ins. Co. v. Evans*, 102 Pa. St. 281, and *Kohnweisler v. Phoenix Ins. Co.*, 57 Fed. R. 562.

The case of *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132, is a very instructive and interesting case on the proper construction of contracts of insurance. The conclusion of the majority of the court in this case finds no support or encouragement in that. The part of the policy under consideration in that case was that commonly known as the "iron

safe clause," wherein the insured "agreed and covenanted" to keep a set of books, etc., and the last inventory of his business in an iron safe at night, etc., and to produce the books and inventory in case of loss, and the clause provided further that "in the event of failure to produce the same, the policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." The loss occurred and the insured did not produce the "inventory" and the company denied liability under the above quoted clause of the policy. Suit was brought and maintained and judgment rendered for the plaintiff. This judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit and again by the United States Supreme Court. The Supreme Court said, "The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policy. But the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. * * * To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers or agents prepared the policy and it is its language that must be interpreted." *National Bank v. Ins. Co.*, 95 U. S. 673, 678-9; *Monlor v. Amer. Life Ins. Co.*, 111 U. S. 335, 341; *Id.* pp. 135 and 136. And on page 138 of the opinion the court says in closing, "A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice." This reasonable and authoritative rule of interpretation applied to the policy in suit would force the conclusion that the plaintiff had made "full

compliance" in so far as proofs of loss are concerned and was entitled to maintain his action.

Whatever the practice in this jurisdiction may be as to authority of the court to direct a verdict *non obstante*, I insist that this is not a proper case for the exercise of such autocratic power. It is not clear that such action does not deprive the plaintiff of an absolute right. He is at least entitled to the privilege of a new trial.

ASIU BROWN *v.* ANDREW BANNISTER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 15, 1902. DECIDED FEBRUARY 14, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If A. promises to marry B. in consideration solely of B.'s reciprocal promise to marry A., and thereafter B., in reliance upon A.'s said promise and of his assurance that the marriage will take place in the near future, yields to his solicitations to have sexual intercourse, A.'s contract is not void as being based on an immoral consideration.

The evidence in this case, an action for breach of promise of marriage, held sufficient to sustain a verdict for the plaintiff for \$2500 damages.

OPINION OF THE COURT BY PERRY, J.

This is an action for damages for breach of a contract of marriage alleged to have been entered into by and between the plaintiff and the defendant. The jury rendered a verdict in

favor of the plaintiff for \$2500. The case comes to this Court on exceptions by the defendant.

Two questions only are presented under the bill of exceptions, one being as to the correctness of the ruling of the trial court in denying defendant's motion for non-suit made at the close of plaintiff's evidence, and the other as to whether or not the verdict is contrary to the law, the evidence, or the weight of the evidence.

The motion for non-suit was based on the ground that the evidence showed that the sole consideration for defendant's promise to marry the plaintiff was an immoral one, to wit, that the plaintiff should have sexual intercourse with the defendant, and that therefore the contract declared on was void. Some of the testimony given by the plaintiff would tend, perhaps, to support the contention that the defendant's promise was in consideration, or upon the condition, that the plaintiff submit to intercourse with him, and it may be that if the jury had found that those were the facts that the appellate court would be unable to set aside the verdict as being unsupported by the evidence. There was other testimony, however, as well of others as of the plaintiff, which was clearly sufficient to sustain a finding by the jury that the defendant's promise to marry the plaintiff was based solely on the plaintiff's promise to marry him and that nothing was said between the parties at the time of the making of such promise as to illicit intercourse. The jury may well have found, further, and such finding would find ample support in the evidence, that the seduction was subsequently accomplished by virtue of the promise of marriage and that the plaintiff yielded to defendant's solicitations in reliance on such promise. In view of the verdict, the presumption is that the jury so found. Subsequent intercourse obtained under such circumstances, after unconditional, mutual promises to marry, does not render the contract void. See *Baldy v. Stratton*, 11 Pa. St. 319, 323; *Kurtz v. Frank*, 76 Ind. 594; *Haus v. Moeller*, 18 S. W. (Mo.) 884; *Spellings v. Parks*, 58 S. W. (Tenn.) 126; also, *Steinfeld v. Levy*, 16 Abb. Pr., n. s., 28 and *Hanks*

v. Naglee, 54 Cal. 52. The motion for a non-suit was correctly overruled.

On behalf of the defendant it is contended that there was no proof of damage and that for that reason the verdict cannot stand. Evidence was adduced tending to show, *inter alia*, the following facts: that the reciprocal promises above referred to were made on September 6, 1897; that soon after the engagement, the defendant requested the plaintiff to live with him assuring her that the marriage would soon take place; that the plaintiff, relying upon the defendant's promise of marriage and upon his assurance of the early execution of such promise, consented and took up her residence with him as his mistress, and that these relations continued until on or about September 26, 1900; that two children were born as a result of this cohabitation, one on November 2, 1898, and one on September 26, 1900; that during this period of time the plaintiff often requested the defendant to fulfill his promise but that he refused and failed to do so, stating on each occasion but the last that the marriage would take place in the future, but not fixing a date certain; that on September 26, 1900, at a time when, as defendant was well aware, the plaintiff was about to give birth to the second child and when the pains of parturition were already upon her, the defendant for the first time announced to her that he would not carry out his promise and that he would soon marry a certain other woman whom he named; that a very few hours after the birth of the child, the defendant left the plaintiff and on the first of October following married another. There was also evidence tending to show that the defendant's determination not to execute his promise and his intention to marry another, were communicated to the plaintiff, not with gentleness and tenderness, but with unnecessary harshness and cruelty; also that the defendant owned property of the value of about \$3000 and was in receipt of a monthly salary of \$100.

The injury to plaintiff's feelings and affections, the mortification and distress of mind, the humiliation and the physical pain suffered by her in consequence of the seduction and otherwise,

the length of the engagement, the degree of plaintiff's devotion to defendant, the conduct of the parties toward each other, the injury to plaintiff's prospects in life, and the disappointment of her reasonable expectations of worldly advantage resulting from the intended marriage, were all elements of damage resulting from the breach and proper to be considered by the jury in estimating the amount of the verdict. In our opinion the proof of damage was sufficient to sustain a verdict in a substantial amount.

It is contended, however, that the sum awarded was excessive, especially in view of the fact that evidence was adduced tending to show that, prior to the alleged engagement, the plaintiff was of unchaste character and had borne two other children, the issue of illicit cohabitation with another man. That was certainly evidence in mitigation of damages. It was before the jury and the defendant had the benefit of it. It was the province of the jury to determine how far to permit that fact to operate in mitigation. Under all of the circumstances as disclosed by the evidence, we are unable to say that the verdict was excessive.

The further point is made in argument that the trial judge in his charge failed to instruct the jury as to the elements of damage and that it was erroneous to simply charge, in effect, as was done, that in assessing damages "you can give such damages as you think are proper under the circumstances," not exceeding, however, the amount claimed, five thousand dollars. It may be that this instruction was erroneous but the error, if any, can not now be taken advantage of because no request was presented by the defendant for further instructions on the subject and no exception was noted to the judge's failure to instruct or to the instruction as given.

The question as to the sufficiency of the allegation in the declaration as to damage, is not presented by the bill of exceptions and therefore will not be considered.

The exceptions are overruled.

Andrews, Peters & Andrade for plaintiff.

J. T. De Bolt for defendant.

FRANK HALSTEAD v. J. W. PRATT, Tax Assessor.**ORIGINAL.****SUBMITTED JANUARY 8, 1902. DECIDED FEBRUARY 15, 1902.****FREAR, C.J., GALBRAITH AND PERRY, JJ.**

The exemption in the income tax law (Laws of 1901, Act 20, §4) of "inheritances otherwise taxed as such" applies only to inheritances otherwise taxed as such under the territorial laws and not to those so taxed under the federal laws.

An inheritance of personal property is "acquired" within the meaning of §3 of the income tax law when it is received or at least when it is receivable and not immediately upon the death of the decedent.

The income tax should be assessed on the balance only of the inheritance after deducting the federal succession tax if the latter has been paid.

OPINION OF THE COURT BY FREAR, C.J.**(Galbraith, J., dissenting.)**

This is a submission on agreed facts. Robert Halstead died June 14, 1900. On June 1, 1901, his son, the plaintiff, received \$20,691.17 as his distributive share of the estate. The administrator had previously (May 23, 1901) paid the federal succession tax of \$155.10 on this share under Section 29 of the Act of June 13, 1898, 30 Sts. at L. 464. This share was not taxable under the territorial succession tax law, Civ. L. Sec. 910. The question is whether or not it is taxable as part of the plaintiff's

income for the year ending June 30, 1901, under the territorial income tax law, Act 20, Laws of 1901.

It is contended first that this inheritance is expressly excepted from the operation of the Act by the last proviso in Section 4, "that in assessing the income of any person or corporation there shall not be included * * * any bequest or inheritance otherwise taxed as such." As shown above, this inheritance is not otherwise taxable as such under the territorial laws, and although, as also shown above, it was otherwise taxed as such under the federal laws, the legislature evidently did not intend to except inheritances taxed under those laws. It seems to be conceded that the exception in the statute would not be applicable if the country in which the inheritance was otherwise taxed were a foreign country, or even if the statute were a state law as distinguished from a territorial law and the law under which the inheritance was otherwise taxed were a federal law, and yet the language of the statute if taken literally would apply in such cases as well as in the present case. The fact that the relation of a territory differs in some respects from that of a state to the federal government forms no basis for a distinction in respect to the question now under consideration. So far as the federal government is concerned, the territorial legislature could have legislated either way upon this question as fully as a state legislature could, and both state and territorial legislatures are equally bound by the federal inheritance tax law and equally presumed to know what that law is. The question is not what the legislature could do, but what it did do—a question of construction and not of power. The general rule is that a statute should be construed with reference to the system of laws of which it is a part, unless a contrary intention clearly appears. If this were not so, statutes would often have to be given absurd constructions, for they often do not contain express provisions as to the extent of their operation in this respect. The intention of the legislature in this instance was to provide revenue for the government of the territory irrespective of what taxes were paid to other governments. This intention would limit the rea-

son for the exemption to inheritances otherwise taxed by the territorial government.

It is contended secondly that, even if the case does not come within the exception, still it does not come within the main provisions of the statute, for the reason that the inheritance was acquired, not when it was actually received, but when the intestate died, which was before the beginning of the year for which the tax was levied. Section 1 provides that, "From and after the first of July, A. D. 1901, there shall be levied, assessed, collected and paid annually upon the gains, profits and income, over and above one thousand dollars, derived * * * from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory * * * a tax of two per cent. on the amount so derived during the year preceding." Section 2 provides that, "In estimating the gains, profits and income, * * * there shall be included * * * money and the value of all personal property acquired by gift or inheritance * * * ." The question is whether an inheritance from one who died before the year began but actually received during the year was "acquired" during the year within the meaning of the statute. It is contended that the legal title passed upon the death of the intestate and that therefore that should be regarded as the date upon which the inheritance was acquired, as has been held under some succession tax laws. Succession tax laws are variously worded. It is within the power of the legislature to provide either that the tax shall be assessed as of the date of the decedent's death or that it shall be assessed as of the time when it is received. Some succession tax laws are drawn one way, some the other way. It is merely a question of the intention of the legislature. The question here is not how this or that succession tax law has been construed, but how this income tax law should be construed. It would seem more natural and just to assess inheritances as income when actually received or at least when payable than when only the legal title passes and when it remains a matter of doubt whether any, or how much, will ever be received. In some cases

this could not be known until the amount of outstanding debts or the validity of outstanding claims is ascertained. The title to the inheritance passes subject to these. The income tax statute as a whole would seem to favor this construction. Foster & Abbot, Income Tax Law of 1894, commenting on a clause in the same language as the one now under consideration, say that "it may well be argued that personal property is not 'acquired' until it is received."

It may be noticed that the only income covered by Section 1 is that derived from property and business, &c., and that since an inheritance is not derived from either of those sources, it is not covered at all by Section 1. But we presume that, construing all parts of the Act together, Section 3 may be regarded as enlarging Section 1 so as to include inheritances.

It is conceded that the amount of the succession tax paid to the federal government should first be deducted and the tax in question be levied on the balance only. *Hooper v. Shaw*, 57 N. E. (Mass.) 361.

In our opinion the distributive share in question, less the amount of the federal succession tax, is subject to taxation under the income tax law. Judgment accordingly.

Hatch & Silliman and *B. L. Marx* for plaintiff.

Robertson & Wilder for defendant.

DISSENTING OPINION OF GALBRAITH, J.

Everybody is presumed to know the law, including the members of the legislature of the Territory of Hawaii. The latter are presumed to legislate in the light of this knowledge. "Laws are presumed to be passed with deliberation, and with a knowledge of all existing laws on the same subject." (Southerland on Statutory Construction, §137.) The statute under consideration exempts from taxation "any bequest or inheritance otherwise taxed as such." The statement of facts admits that the bequest to the plaintiff was "otherwise taxed as such," under the *War Revenue Statute*, approved June 13, 1898, and in force

and effect in this territory at the time Act 20, Session Laws of 1901, was enacted.

It is stated that the "legislature did not intend to except inheritances taxed under" this federal statute. What the evidence is or where it appears that shows such an intent on the part of the legislature I have been unable to find. It certainly does not appear from the language used by the legislature. The well settled rule of statutory interpretation is stated thus: "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no functions of legislation, and simply seek to ascertain the will of the legislator." (*U. S. v. Goldenberg*, 158 U. S. 102-3.)

The contention that the exemption would not apply to a tax collected under the law of a state or foreign government can have no application to the issue for the reason that the legislation of a state or foreign government as a general rule can have no extra territorial jurisdiction. The legislators of the Territory of Hawaii can only be expected to have in mind and to take regard of laws in force in this territory. That is the extent of their legislative jurisdiction. The Congress of the United States that enacted the law under which plaintiff's inheritance was "otherwise taxed" is the legislative branch of the government in which the sovereignty of the Territory of Hawaii is vested and it has paramount legislative jurisdiction over this Territory, so much so that it might even repeal or abrogate any law passed by the territorial legislature. The law of Congress taxing inheritances was in force in the Territory of Hawaii at the time Act 20 was passed. The fact that the tax collected thereunder goes into the federal treasury does not affect the issue. The legislature may have had in mind the fact that the Territory of Hawaii occupied a different relation to the Federal Government than any of the states of the Union in this that in the states the salaries of all the officials except the officers of the United States are paid from the state treasury while here the salary of the Governor and

his secretary, the Secretary of the Territory, the Judges of the Supreme and Circuit Courts are all paid from the federal treasury. The legislature must have known this fact. We cannot say that the legislature did not know of this federal law taxing inheritances and for that reason did not in terms exclude from the exemption inheritances taxed under it. It must be held to have intended what the plain words of the statute indicate. The language used is simple, plain and unambiguous. There is no occasion for interpretation or searching for a hidden and unexpressed meaning under the plain terms used. The plaintiff is within the plain letter of the exemption and I cannot find any satisfactory evidence warranting the conclusion that the legislature intended that he should be deprived of its benefit.

IN THE MATTER OF PROBATE OF THE WILL OF
NALIMU NAOIWI (w), deceased.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 16, 1902. DECIDED FEBRUARY 15, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a controversy over the probate of an alleged will, the verdict of a jury in favor of the contestants, being supported by the evidence, is affirmed.

OPINION OF THE COURT BY GALBRAITH, J.

The appellants, beneficiaries under the alleged will of Nalimu Naoiwi, deceased, made application to a Judge of the First Circuit Court for the probate of said will. This petition was resisted by the heirs at law of the deceased on two grounds: (1)

that the will was not executed or published according to law; (2) that the will was obtained by undue influence exercised upon the testatrix and was null and void.

After a hearing the Circuit Judge denied the prayer of the petition and refused to permit the will to be probated. An appeal was taken to the Circuit Court and a jury trial was demanded and allowed. The jury returned a verdict for the contestants to which judgment the proponents excepted as being contrary to the law and the evidence and the weight of the evidence.

It is contended in this court that the verdict of the jury is entirely unsupported by the evidence and for that reason should be set aside and a new trial ordered.

The evidence is not satisfactory and cannot be said to support any theory of the controversy with unanimity. The star witness for proponents on the second trial confessed that he committed wilful perjury on the first but seeks to excuse himself by the statement that Naoiwi, one of the proponents and late husband of the testatrix, induced him to swear falsely. Naoiwi, thus accused of subordination of perjury, makes no denial before the jury. The evidence further shows that this self confessed perjurer, one of the witnesses to the will, copied the will from one prepared or at least furnished him by Naoiwi. The evidence on pages 46 and 47* of the record of the first trial, introduced before the jury, shows the pitiable condition of the testatrix, her mental and physical suffering at the time of the execution of the will. The cross-examination of the witness, Punikala, vividly portrayed to the jury the scene at the execution of the will as follows: "A. No; you could not let her go after you had got her up into a sitting position; you would have to hold her.

"Q. Who was holding her when she signed the will? A. She was laying on her side; when this paper was brought in front of her she signed her name to it.

"Mr. Magoon: Sort of reclining; not lying down? A. Yes reclining.

"Mr. Kinney: Did any one ask her to sign the will? A. Naoiwi said to her write her name.

"Q. What answer did she make? A. She wrote her name down.

"Q. Who read the will to her? A. Naoiwi did.

"Q. Not Kanalu? A. No.

"Q. What did she say if anything when the will was read, did she say it was good or bad, or what? A. Naoiwi read the will to her. He read it about half way and he stopped and asked her, he said to her, how is this, is it right? He asked her twice and then she answered, leave that paper alone until by and by, leave that paper. And then Naoiwi kept on and read the balance. And he read it over twice and then asked her to put her name to it.

"Q. What answer did Naoiwi make when she said leave that paper until by and by? A. He made no reply.

"Q. What did he do? A. Naoiwi didn't put the paper away, he kept on reading it.

* * * * *

"A. All I know is this, that Naoiwi read the will over to her until it got to where this money and land was and he stopped and asked her whether it was all right or not; she made no reply and he asked her again, and then she said, leave that paper; put that paper away, and Naoiwi kept on reading."

This testimony might have raised a doubt in the minds of the jury, if it did not produce absolute conviction that the will offered for probate was not the free and voluntary act of the testatrix. Taken in connection with the other evidence showing the weak and debilitated condition of the testatrix in body and mind; that she died four days after signing the will; the fact that Naoiwi caused the will to be copied from his own handwriting to that of Kanalu's; that he induced Kanalu to swear falsely at the first hearing and that he was fifty-six years of age and the testatrix was seventy when the brief and romantic courtship ended in marriage, all of these facts would tend to show that the will presented was procured by undue influence.

We conclude that there is sufficient evidence to support the verdict of the jury. The trial court fully covered the law of the case in its lucid and concise charge to the jury. The questions

of fact were submitted to the jury and determined against the proponents. This determination is final. In fact it is by no means clear that another jury would not render a similar verdict.

Exceptions overruled.

J. A. Magoon and T. I. Dillon for proponents.

Kinney, Ballou & McClanahan for contestants.

CONCURRING OPINION OF PERRY, J.

The case for the contestants was, it seems to me, a weak one. Nevertheless there was evidence before the jury sufficient to sustain a finding that the will was not the free and voluntary act of the testatrix and that it was procured by undue influence. The verdict cannot under the circumstances be disturbed. The responsibility for the finding of fact is upon the jury. I concur in the conclusion that the exceptions must be overruled.

JOAQUIN SILVA *v.* J. F. SOUZA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 8, 1902. DECIDED FEBRUARY 17, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an action for damages for removing and appropriating a division fence, the property of the plaintiff, and for the construction of a new fence on plaintiff's land near the division line, being a picket fence 30 feet in length and six feet high, a judgment in favor of the plaintiff for \$336 is excessive.

Where an appeal is taken from a judgment of a district magistrate to

a circuit judge at chambers, the circuit court has no jurisdiction to hear and determine the cause.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff sued the defendant in the District Court of Honolulu for trespass, claiming damages in the sum of \$300. The district magistrate rendered judgment in his favor for \$10.00 and costs. On appeal the cause was submitted on the record and evidence certified from the lower court. Judgment was given for the plaintiff for the full amount of his claim with interest from the date of the trespass amounting to \$336. To the entry of this judgment the defendant duly excepted and, in this court, contends, (a) that the judgment is contrary to the law and the evidence and the weight of the evidence; (b) that the judgment is excessive.

The evidence is meagre and unsatisfactory. It appears that the parties are neighbors and reside on adjoining lots; that there was a division fence near the line separating the house lots of the parties and that this fence belonged to the plaintiff and was erected entirely on his premises; that the defendant against the protests of the plaintiff removed this fence and replaced it with a new one; that the new fence was about 30 feet long and six feet high, and was higher than the old one; that the old fence had been there for 15 years; that the new fence is constructed of pickets made of battens nailed to posts set in the ground; that three men in one day removed the old fence and constructed the new one; that the defendant appropriated the old fence to his own use.

It is clear that the plaintiff's rights were invaded by the defendant and that he should recover judgment for the amount of the injury suffered. (C. L. Sec. 1241.) How to determine this amount under the evidence is the difficult question. The only evidence in the record as to the amount of damages is that given by the plaintiff, and on this the circuit court based its judgment. This evidence is as follows: "I am damaged by the fence he had taken down and fence he put up. I value my damage at

\$300." On cross-examination he further testified: "I arrive at damages of \$300 by my telling not to take old fence down and giving bad appearance of premises by new fence and by the fence being too high; it shuts off the view. It prevents me from seeing the mountains and houses in the rear." The proper measure of damage in this case is full compensation for the injury to plaintiff's property caused by the acts of the defendant in removing and appropriating the old fence and the construction of the new "the natural and proximate consequences of the act complained of."

From the evidence it is impossible for us to determine with certainty what this amount is. Ordinarily we might indulge the presumption that the judgment appealed from was correct. This cannot be done in this instance for the reason that the record shows that the circuit court had before it only the evidence that is before us, i. e., that certified from the district court.

It appears that the elements relied on as going to make up the total of damage claimed by the plaintiff consist of: (1) the fact that he told the defendant not to remove the old fence; (2) that the new fence is higher than the old, gives a bad appearance to the premises and cuts off the view; (3) the appropriation of the old fence by the defendant.

The first is a claim for exemplary damages. The record clearly shows that this is not a proper case for the allowance of such damage. The second element is a proper claim for damages, the fence being upon the plaintiff's land, but under the evidence it cannot be estimated. We know that it could not be very great, possibly what it would cost to saw off the excess in height of the new fence above the old or to remove it altogether. (*Jones v. Erie and W. V. R. Co.*, 17 L. R. A. 763.)

Under the third element the plaintiff is entitled to recover the value of the old fence appropriated by the defendant.

Under the general rule for the assessment of damages, "A witness is not allowed to give his opinion of the amount of damages a party sustains from a given act or omission, because when

he does so he includes the law as well as the fact. It is the province of the jury to assess the damages according to the rule of law, which it is the province of the court to lay down for their guidance; and witnesses are allowed only to furnish the data from which the amount is arrived at. And where the injury consists of distinct elements, it is not competent to ask a witness to make a general estimate, but he should be asked to estimate the specific items separately." (1 Sutherland, Damages, pp. 794-5.) See also *Sharon Town Co. v. Morris et al.*, 18 Pac. 230; *Upcher et al. v. Oberlander*, 31 Pac. 1080; *Howell et al. v. Medler*, 41 Mich. 641.

We are of the opinion that the plaintiff is entitled to damages. How much it is not possible to know with certainty, but it is clear that he is not entitled to the amount given by the judgment appealed from. This is excessive. The new fence is wholly upon the plaintiff's land. He can at slight expense remove it or remodel it to suit his taste and thus restore the view and appearance of the premises to the same condition as before the trespass. If the limbs cut from the trees were overhanging the division line the plaintiff sustained no injury by the act of removing them. (*Andrea Grandona v. Ole Olson Lovdal*, 78 Cal. 611.)

Although this case came before us on a bill of exceptions from a judgment of the Circuit Court of the First Circuit, and we have passed upon the exceptions, still it appears from the record that the appeal was taken to the Circuit Judge at chambers. The judgment excepted to was rendered by the Circuit Court without jurisdiction. The exceptions are sustained and the cause remanded to the Circuit Judge with direction to grant a trial at chambers.

J. M. Viras for plaintiff.

J. T. De Bolt for defendant.

HAWAIIAN COMMERCIAL AND SUGAR COMPANY
v. WAILUKU SUGAR COMPANY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JULY 5, 1901. DECIDED FEBRUARY 19, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A decree is binding between co-defendants, when they are adversary to each other and when their rights as against each other are adjudicated, whether there are cross-pleadings between them or not, if the matters could be adjudicated under the pleadings between the plaintiffs and defendants.

One who appears generally and is made a party at his own request is bound by the decree so far as it properly goes under the pleadings, even though he appeared in consequence of a published notice which was not so broad as the complaint.

The doctrine of splitting causes distinguished from that of *res judicata*. So far as the ultimate matter adjudicated is concerned, all intermediate matters are conclusively presumed to have been adjudicated whether in fact raised or adjudicated or not.

As to other ultimate matters, only those intermediate matters are regarded as adjudicated which were in fact adjudicated.

Other ultimate matters themselves are not regarded as adjudicated if they were not in fact adjudicated although they might have been so far as the pleadings were concerned.

A decree is binding as to necessary inferences though not as to possible or probable inferences from it.

Under a complaint that the defendant unlawfully constructed and maintained a dam and by means thereof diverted water, a decision that the dam need not be removed because it might be lawfully used for a diversion to certain land and does not appear to be used for a diversion to any land, does not settle that it might lawfully be used for a diversion to other lands.

Nor does a decision that a certain quantity of water may lawfully be diverted at other dams settle that the same or any less quantity may lawfully be diverted at this dam.

A decision that a certain quantity of water may be taken from an ancient ditch by means of a new flume to lands that have no water rights because of a discontinuance in the use of a certain other quantity of water on other lands that have water rights, does not settle that an additional quantity may afterwards be so taken at the same point, or even the same quantity if the use of water on the old lands has been resumed, or an additional quantity in lieu of using it on still other lands that have water rights.

Under a complaint that defendant enlarged ancient ditches and took more water than it was entitled to and took water to lands that had no water rights, it was proper to decide that the defendant had acquired a right to take all the water in controversy by day and the plaintiffs a similar right by night, as a basis for the conclusion that the defendant's acts were not prejudicial to the plaintiff's rights, since if it had the right to take all such water at certain points during certain times it was immaterial whether it took it in large or small ditches or to lands that had or to lands that had not water rights.

Such intermediate finding of an alternate day and night use is *res judicata* in other suits between the same parties as to the same or other acts complained of.

The decision in *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651, that the defendant had an exclusive day right to water (subject to certain exceptions), referred to prescriptive rights only and did not cover surplus or storm water. It was not intended to cover surplus water, nor is it a necessary inference that it did, in spite of an actual contrary intention.

That decision did not (aside from the finding as to an exclusive prescriptive day right) adjudge that the defendant had a general right to a fair proportion of the surplus water, or that it was not then taking more than its proportion, if it had such a right. The court did not intend to so decide, nor is it a necessary inference that it did, even if the pleadings were broad enough to have permitted it to do so.

OPINION OF THE COURT BY FREAR, C.J.

This is a suit in equity for an injunction to restrain the defendant from diverting water from the Wailuku stream on the island of Maui to the injury of the plaintiff. The defendant included in its answer a plea of former adjudication as to several matters alleged in the bill, and the Circuit Judge, by consent subject to the right of appeal, entered a decree sustaining the plea. The question on this appeal from that decree is how far

the decision in *Lonoaea et al. v. Wailuku Sugar Co.*, 9 Haw. 651, which is the decision relied on in the plea, is decisive of the present controversy.

No formal decree was entered in the former case, but as counsel on both sides have treated the decision as if it were a decree, we shall not raise the question as to how far a decision as distinguished from a decree may be relied on, either by way of plea or as evidence. It may be that the decision should be regarded as in the nature of a decree,—in view of the language of the statute relating to Commissioners of Private Ways and Water Rights, under which that case was brought, and in view of the practice in such cases.

The plaintiff is a California corporation and owns the greater part of the ahupuaa of Wailuku and various kuleanas therein. The defendant is a Hawaiian corporation and owns a considerable portion of the arable land of the ahupuaa and numerous kuleanas in the ahupuaa. The plaintiff's predecessor in title, Claus Spreckels, was a party to the former case. The plaintiff is bound by the decision in that case to the same extent that Claus Spreckels was. And although the latter was then a co-defendant with the present defendant, he was bound equally with the plaintiffs in that case as to any rights that were adjudged to be in his co-defendant. A judgment or decree, of course, does not always bind co-defendants as against each other, but it does when they are adversary to each other. There need not be cross-pleadings between themselves. It is sufficient if they contest an issue with each other upon pleadings between them and the plaintiffs. The fact that they are formally on the same side is immaterial, if they have actually contested issues that might properly be contested under the pleadings between the plaintiffs and defendants. See 1 Van Fleet, Form. Adj. Sec. 256; *Elliott v. Pell*; 1 Paige 263; *Devin v. City of Ottumwa*, 53 Ia. 461; *Leavitt v. Wolcott*, 95 N. Y. 212; *Harmon v. Auditor*, 123 Ill. 122. The former case was brought originally by certain plaintiffs against the present defendant only, but after publication of notice others came in as plaintiffs and

Claus Spreckels came in as a defendant. Although nominally a defendant, his interests were with those of the plaintiffs rather than those of his co-defendant, and he appealed from several findings made by the commissioner in favor of the co-defendant. His counsel was one of the counsel for the plaintiffs also. He is bound by the decision so far as the decision properly went, and since the decision was not merely for or against the plaintiffs or defendants leaving the rights as between the defendants unadjudicated, but specifically declared certain rights to be in the co-defendant alone, it is difficult to see how some of the rights so adjudicated remained in him.

It may be, as contended, that the published notice in the former case was not as broad as the complaint and original summons, but Claus Spreckels, although not personally served with process, was nevertheless bound by the decision so far as it properly went under the complaint, for his general appearance and request to be made a party was a waiver of any defect in the published notice. Indeed it does not appear that he entered the case in consequence of the published notice, and it was immaterial whether he had proper notice or any notice as distinguished from knowledge so long as he appeared generally and became a party for all proper purposes.

The main question is, what was adjudicated in the former case? Elaborate briefs have been filed discussing a number of propositions under the law of *res judicata*—chiefly as to what was intended to be, what might have been and what is presumed to have been adjudicated under the pleadings. As we understand counsel, the doctrine of splitting causes is not relied on. That is based on public policy and is expressed in the maxim that a party ought not to be twiced vexed for the same cause. It would apply in general not only to matter which was not, but could have been, adjudicated under the pleadings, but also to matter that could not have been adjudicated under the pleadings, if the pleadings ought to have been made broad enough to cover such matter if intended to be relied upon and if such matter should have been litigated then if at all. A person may

bring several actions on as many different causes even though he might join all the causes in one action, but he may not as a rule bring several actions on different parts of one cause. The doctrine of splitting causes is perhaps as closely allied to the doctrine of *lis pendens* as to that of *res judicata*. The latter is the doctrine relied on here. It is based on the presumptive correctness of the former decision, and the question is what that decision was—not merely what it was intended to be, but what it was in law, which depends not only on what it was intended to be but also upon whether as so intended it went beyond or fell short of the case presented by the pleadings.

We may assume on the one hand that the decision in question could not properly go beyond the pleadings, for in our opinion it did not do so. We may concede on the other hand the general correctness of the proposition that a decision is decisive not only of everything that is litigated but also of everything that might be litigated in a case. But this proposition needs some qualification before it can be intelligently applied. It has reference to a distinction between intermediate and final matter in a case. A final decision fixes certain rights and in a contest as to such rights it is incumbent upon parties to put in their whole case. If they do not, it is their fault and they cannot afterwards be permitted to set up what they previously omitted. Consequently so far as the subject matter or ultimate thing adjudged is concerned it is conclusively presumed that every intermediate point that might have been raised was settled whether it was raised or not. But as to a different subject, only such points as were actually raised and decided in respect of the first subject are regarded as settled. For although the subject is different, still the parties have actually had their contest over the intermediate point and should not be permitted to have a second contest; but intermediate matters not litigated or decided in the first proceeding are not regarded as settled as to a different subject, for not only have they not been decided in fact but there was no duty to litigate them in the first case except so far as that case was concerned. A party may waive his

right to litigate a matter as to one thing without waiving his right to litigate it as to another thing, for he may waive his right to the thing itself without waiving his right to another thing. See *Mossman v. Government*, 10 Haw. 421. But the presumption that intermediate matters were adjudicated which might have been litigated as to a particular ultimate matter is very different from a presumption that a different ultimate matter was raised and adjudicated even though it might have been under the pleadings if the parties and the court had seen fit to raise and decide it. To illustrate, a complaint might be broad enough to permit a decision as to all rights in a certain stream but the parties might actually litigate and the court actually decide only certain rights confessedly leaving others undecided. It would be conclusively presumed that all matters that might have been litigated as to the rights actually adjudicated were settled whether litigated or not, but as to the remaining rights only such intermediate matters as were in fact litigated would be regarded as settled, and the remaining rights themselves or ultimate matters could not be regarded as settled from the mere fact that they might have been. Of course, these propositions are stated subject to other established principles, such as that the parties must be the same, the matter must be directly in issue and the court must be one of complete jurisdiction. We may add also that another proposition relied on in argument, namely, that there is no estoppel as to matters that may be merely inferred from a judgment, applies only to inferences that are possible or probable and not to those that are necessary.

The Wailuku stream rises in the Iao valley, a large basin nearly surrounded by high precipitous mountains, and flows out of the valley through a narrow defile and down a gulch through comparatively low hills and plain country to the sea. In the defile there is a kuleana or small holding named Manienie near which the defendant has constructed a dam, a portion of the water above which it takes through a pipe and ditch to kula or dry land some distance below. A short distance below the defile the stream is tapped on the left bank by an ancient ditch called

Kalaniauwai and further down on the right bank by another ancient ditch called Kamaauwai. Kalaniauwai is tapped a short distance below its head by a comparatively new flume, constructed by the defendant, through which a portion of the water is taken across the stream to kula land below.

The first question arises in regard to the dam at Manienie. The complaint in the former case alleged that the defendant had unlawfully constructed the dam and unlawfully maintained it, whereby the flow of water in the stream was obstructed and diverted and the plaintiffs deprived of water to which they were entitled, and prayed that all illegal dams be abated. The commissioner decided that it did not appear that any water was being diverted by means of the dam, that Manienie had a water right, that to take water from the stream it was usual to tap the stream by means of a dam and ditch, and, as the dam in question might be used for a legitimate purpose and was not then used for any illegal purpose, he declined to order its removal. The Supreme Court on appeal sustained "the decision of the Commissioner in refusing to order the dam at Manienie removed, for the reasons given by him." The present bill alleges that the defendant has unlawfully constructed a large dam in the stream at a place called Maniania and unlawfully maintains the same there and uses the water flowing in a pipe and ditch from above the dam to irrigate large tracts of kula land not entitled to water for irrigation, and situated a mile or more distant therefrom, and by means of the dam is unlawfully diverting from the stream large quantities of water, &c., and prays for an injunction against the diversion of the water. Assuming that the Manienie in the former case is the Maniania of the present case and that the dam now complained of is the same that was complained of in that case, the decision in that case at most settled that that dam was lawfully constructed and maintained. It was not adjudged whether water could be taken from above the dam to distant kula land or not. So far as the construction and maintenance of the dam is concerned, it may be that every point that might have been raised and decided must be presumed to

have been settled, but so far as the diversion of water was concerned, although the complaint may have been broad enough to have permitted a consideration and decision of that question, still the evidence showed that no water was diverted, and there was no decision in fact as to whether it might properly be diverted or not in the way or in the quantity in which or to the place where it is now alleged to be diverted. It could not be presumed that the question of any particular diversion was settled merely because the dam was not ordered removed, for, aside from the fact that the decision shows the contrary upon its face, the refusal to order the dam removed might have been based on any one of several grounds, and in law as well as in logic it cannot be inferred that a conclusion was based upon any particular one of several possible premises. Nor did other portions of the decision, hereinafter to be more specifically referred to, which settled that the defendant was entitled to a certain quantity of water elsewhere, settle also that it could take the same or any less quantity at this dam to the kula lands below. That would depend upon whether the proposed change in the place of user would be prejudicial to the rights of others. That would be so even though the defendant had the right to take elsewhere all the water in the stream during specified hours and *a fortiori* if it had only the right to take elsewhere all or nearly all the water to which it was entitled, though not all in the stream, during certain hours. So much as to the diversion at the Manienie dam. Now as to other diversions.

The main difficulty as to other diversions, and this is the main difficulty in the case, lies in ascertaining just what was decided in the former case, and so we shall consider that question before stating the allegations in the present bill as to the other diversions in question.

The complaint in the former case alleged in substance that the defendant had unlawfully enlarged and tightened the dam and constructed a new dam, at the head of Kalaniauwai, and enlarged and deepened Kalaniauwai, and so maintained the same, whereby it took more water than it was entitled to and

deprived the plaintiffs of water according to their right; and had illegally tapped Kalaniauwai by means of a flume illegally constructed by it and thereby diverted large quantities of water from the auwai and maintained the flume and continued to divert the water, whereby, &c., and unlawfully enlarged Kamaauwai and so maintained the same and unlawfully diverted large quantities of water into the same beyond what it was entitled to, and taken water to land not entitled to the same beyond the limits of the auwai, whereby, &c., and prayed "that the rights of the parties in the water of said stream may be adjudicated, that all illegal dams, flumes and structures erected or maintained by defendant may be abated, that all illegal use of said water by the defendant may be restrained, that the method by which defendant obtains water from said stream may be regulated," &c.

The prayer is perhaps broad enough taken by itself to cover almost any question that might arise in connection with water rights in the Wailuku stream, but if taken in connection with the specific acts complained of, it would be considerably narrowed. The complaint was in substance that the defendant was taking by means of changes in the dams and auwais more water than it was entitled to through the two main auwais and was also taking water through the flume and otherwise to lands which had acquired no prescriptive water rights.

The ancient mode of diversion was for these auwais and the stream to each take one-third of the water in ordinary times, and then for the owners of land along the auwais and the stream to subdivide the water according to their prescriptive rights. But the defendant contended that the former mode of diversion had been changed by prescription so that, instead of a continuous flow of one-third of the water in each auwai and the stream, the defendant was entitled exclusively during the day (from 4 a. m. to 4 p. m.) and the plaintiffs during the night (from 4 p. m. to 4 a. m.). And as to the lands that it was irrigating which had no water rights, it contended that the water which it was so using was water which it was entitled to in

respect of other lands, and that it could so transfer the water so long as it did not interfere with the rights of others.

The commissioner held that the ancient mode of diversion had not been changed, that it was immaterial whether the dams and auwais had been changed or not, so long as each auwai took only one-third of the water, and that the transfer of water from lands that had to lands that had not water rights could not be made, inasmuch as it was not shown that the rights of others would not be prejudiced thereby, and therefore that the defendant should cease taking water through the flume. The Supreme Court on appeal held that, subject to some qualifications, the ancient mode of diversion had been changed by prescription from a continuous use to an alternate day and night use, that the dams should be kept substantially as they were then, and that the transfer of water from lands that had to lands that had not water rights could properly be made, inasmuch as the exercise of the defendant's right to use the water by day could not diminish the plaintiffs' supply by night. The minority of the court agreed with the majority, subject to certain further qualifications, that the alternate day and night use had become established, and was of the opinion that the transfer of water from certain lands to other lands did not prejudice the rights of others, basing this opinion, however, upon the quantity of water taken rather than upon the time when it was taken.

It is clear that it was decided, and properly so under the pleadings, that the defendant could irrigate by means of the flume and otherwise the land then in question which had no water rights, provided it refrained from using water belonging to other lands in such quantity as not to prejudice others in the enjoyment of their rights. This point was covered by the pleadings, was actually litigated and expressly decided. Of course the defendant could not continue to use the water on the new lands and at the same time resume the use of the water on the old lands, nor did the decision settle whether it could make other transfers of water in the future.

It was also properly decided under the pleadings that an alter-

nate day and night use had become established. The pleadings raised the question whether the defendant was taking more water than it was entitled to through the auwais and whether it could transfer water from certain lands to other lands. The court might have arrived at a solution of these questions by following any one of several lines of reasoning. It was at liberty to select any one of these lines. The parties themselves seem to have considered the question of continuous or alternate day and night use the main question in the case. The controversy apparently arose largely in consequence of alleged violations of an alternate day and night use, and the evidence and argument were directed largely to that question. The court also naturally directed its attention to it. Was it one of the intermediate points that might properly be passed upon in solving the questions raised by the pleadings? We think it was. If the defendant was entitled to take during the daytime at certain points all the water there was in the stream or all the water that was in controversy, though at times less than all there was in the stream, or even all subject to certain exceptions so long as those exceptions were not interfered with, it was immaterial to others what it did with that water or to what lands it took it. The majority of the court so found as to the day and night use and so reasoned as to whether the defendant was acting unlawfully in doing the acts complained of. The minority was of the opinion that the day and night use was not established in respect of sufficient of the defendant's lands to justify the inference that the acts of the defendant were lawful, and so adopted a different line of reasoning, that of the quantity of water taken irrespective of the time, to support the same conclusion. The conclusion of the majority followed from its premises. But as the minority did not agree with the majority as to the soundness of those premises, it adopted other premises to reach the same conclusion. The finding by the majority that the day and night use was established being an intermediate point that might properly be litigated and decided and one that was actually litigated and decided, it is

res judicata as to the parties to that suit and their privies in other suits touching the same or different matters.

One of the most important questions is whether the former decision adjudged that the defendant had the right during the day, subject to certain qualifications, to all the water in the stream or to only the water to which it had a prescriptive right in respect of the lands owned by it. In other words, did that decision settle the question as to so-called surplus water, that is, the water, whether storm water or not, that was not covered by prescriptive rights. In our opinion, so far as the alternate day and night use was concerned, only prescriptive water rights were adjudicated. The concluding paragraph of the decision seems clear upon this point.

"The judgment of the Court is that the plaintiffs excepting those whose rights are specially considered herein above are entitled to such amounts of water as they have acquired by prescription for their various lands during the night from 4 o'clock p. m. to 4 o'clock a. m. of each day from the various large auwais leading from the Wailuku river; that the defendant corporation, the Wailuku plantation, is entitled to the water for its present estate from these auwais on each day of the week, excepting Sunday, from 4 o'clock a. m. to 4 o'clock p. m., the dams to be kept substantially as they are at present, composed of loose stones and dirt; the defendant corporation to carry out this order."

It thus appears that the defendant was adjudged to be entitled during certain periods to "the water *for its present estate* from these auwais." This does not mean that it was entitled for use on its then estate to all the water in these auwais, much less to all the water in the stream. It means that it was entitled, during certain hours from these auwais, to the water for its then estate, that is, that it was entitled to take from these auwais during those hours all the water that its then estate had by prescriptive right. If there were any doubt as to the construction of this language taken by itself, it would be set at rest by the explicit language used in the first part of the paragraph, wherein the plaintiffs are adjudged to be entitled during the correspond-

ing night hours from the same auwais, "to such amounts of water as they have acquired by prescription for their various lands." There was no occasion for discriminating between the plaintiffs and the defendant as to the classes of rights adjudicated. As matter of fact only similar rights of both plaintiffs and defendant were involved or considered. The main question was whether the ancient method of diversion established by prescription had been changed by prescription. The opinions of the commissioner and of the majority and minority of the Supreme Court are all full of indications that prescriptive rights only were involved, at least so far as the question of the alternate day and night use was concerned. For instance, the majority says that the defendant "acquired a prescriptive right to use the water by day;" and the minority that "none but prescriptive rights are set up in this case." The opinions contain frequent references to the lands that had acquired prescriptive rights and are largely taken up with a discussion of the law relating to prescriptive rights, and are based on a consideration of such facts and law. The decision could not in the nature of things have had reference to all the water, not only because the auwais in question were not large enough to carry all the water in times of plenty, but also because the rights adjudged,—whatever they were, were adjudged solely with reference to adverse user, and therefore they could not have extended beyond the user—which did not include all the water in times of plenty. The words "for its present estate" must have some meaning. They must limit the amount of water to that theretofore used or at least to that needed on such estate. In either case if the defendant wished to irrigate by day additional lands that had no water rights it could do so only by using thereon water that might otherwise be used or needed on the old estate. It could not, so far as that decision is concerned, use additional day water even though there were an abundance of it. We may add also that the controversy arose in a time of drought and that this fact was prominently before the court and that the rights in question were

spoken of with reference to dry and ordinary times as distinguished from times of plenty. The prescriptive day right might cover all the water in the stream in dry times, but that would be, not because it covered all the water however much there might be, but because it covered a certain amount and there was not more than that amount in such times. It would indeed have been strange if the court had intended to adjudicate rights to so-called surplus water without more explicit language. Such rights are fast becoming of very great importance and their adjudication would involve questions of great difficulty. Moreover, the question of the right to such water has long been a mooted question suggested in numerous cases that have come before this court and always recognized as one of great difficulty, and the court has carefully avoided passing upon it until compelled to do so and has always regarded it as an unsettled question.

Nor does it follow as a matter of law as a necessary inference as distinguished from the actually intended decision, that all the water in the stream including surplus water was adjudged to belong to the defendant during the day, because the majority of the court based its decision on the ground that the exercise of the defendant's right by day could not diminish the plaintiffs' supply by night. If all rights, prescriptive and other, had been involved, that conclusion could be supported only on the premise that all the defendant's rights were day rights and all the plaintiffs' rights were night rights; but since prescriptive rights only were involved, the conclusion as to such rights only would follow from the premise that the defendant's prescriptive rights only were all day rights and the plaintiffs' prescriptive rights only were all night rights. And, as indicated above, the same would be true as to a portion only of the prescriptive rights, provided the remainder were not interfered with, and such was the opinion of the majority of the court for certain exceptions as to the day right were expressly held in favor of certain other parties.

The further question arises, however, whether the court did

not decide elsewhere in the opinion, not indeed that the day or the night right or the prescriptive right or any absolute or exclusive right to any particular quantity or for any particular time covered the surplus water, but that all parties had a right to a reasonable proportion of the surplus water. On page 659 the court begins its opinion by saying:

"It appears to us to be well settled by the evidence, that in a rainy time when the Wailuku river was running full and all the watercourses leading from it were also full every one could use the water from the river for irrigation without reference to the time of user or the quantity taken. No one questioned this. When all had enough no one wanted more than he could use.

"So, also, when the rains, either those falling in the mountains only, or when they were general, made freshets in the river, the Wailuku plantation would run off into reservoirs surplus water that otherwise would run into the ocean. The conservation of storm water was free to all who desired to appropriate it and we see no valid objection to its practice being continued. It would become objectionable if the plantation or any party by the creation of immense reservoirs or other mechanical structures should take all the storm water and deprive others of an opportunity to do the same.

"No one testifies to any difficulty when rains are copious and water is plentiful. But it is in dry times, when the water is low in the river, that anxiety is felt by the cultivators of sugar cane and of kalo that they may not have enough water."

These were merely general introductory observations such as are frequently made in water cases. They were not intended to fix the rights of the parties. The language is general, not purporting to fix or define any rights, and the final paragraph of the decision which purports to give the conclusion of the court on the whole case makes no reference to surplus water either directly or by implication, but on the contrary expressly excepts Sunday, the water on which day was classed with surplus water. The court meant to remark in substance merely that it was better to use surplus water than to allow it to run to waste, and that any one could use it so long as the rights of others were not prejudiced thereby. The court saw no valid

objection to the defendant's continuing to run surplus water into reservoirs so long as no one was injured thereby, but declined to hold that it had a right to do so as against others during the specific time that it especially claimed such right. The passage quoted has particular reference to the running of water by the defendant into its reservoirs. The defendant did that chiefly on Sunday. The court stated (p. 664) that the defendant's "exact claim" included the right to run water into its reservoirs on Sunday from 4 a. m. to 10 a. m., but in its final conclusion in which it defined the defendant's rights, it expressly excepted Sunday. It could, then, hardly have intended to adjudge that the defendant had a right to run water into its reservoirs on Sunday. And since Sunday water was classed as surplus water and was that to which the passage in question had special reference, the court could hardly have intended in that passage to adjudicate other surplus water. The court apparently meant to state what was done and that no objection appeared to call for the court's intervention at that time. It did not appear that any one else then desired to use such water, and if the defendant did not use it it would run to waste into the sea. Nor did the questions of the enlargement of the auwais and the transfer of water to new land require a decision of the question of surplus water, even if the complaint was broad enough on those points to have justified such a decision, if it had been made, and the court in fact disposed (p. 663) of both those questions without reference to the question of surplus water, reasoning from a different premise entirely. And from what has been said above upon the question of the alternate day and night right, it would be strange under the circumstances for the court to have decided such an important, difficult and often discussed question as that of the right to surplus water in such an off-hand indefinite way in an introductory part of a decision, and to have decided that the defendant was not then taking more than its proportion of the surplus water, day and night and Sunday, without any evidence or consideration as to area or location or character, whether arable or not, whether wet or

dry, konohiki or kuleana, adjacent to the stream or not, of the lands in question. So far as these considerations are concerned, the court could have considered on the evidence only prescriptive rights which admittedly do not cover surplus water, and a reading of the decision as a whole shows that those were the only rights that the court intended to adjudicate. It would, indeed, hardly have intended to make an abstract decision that the defendant was entitled to a fair proportion of the water irrespective of the question whether it was then taking more than its proportion and irrespective of any practical application of such a ruling to the facts or requirements of the case, and the court certainly did not have before it or attempt to consider such data as would be necessary to enable it to decide whether the defendant was taking more than its proportion of surplus water, nor did it attempt to decide that practical question.

If the court in fact adjudicated only prescriptive rights it would not be presumed to have adjudicated rights as to surplus water also, even if the complaint would have permitted such an adjudication. This follows from the principles of the law of *res judicata* set forth in the early part of this opinion.

The present allegations, in bar to which the former decision is specifically pleaded, are, besides those already referred to relating to the Manienie dam, in substance that the plaintiff is the owner of the ahupuaa together with the konohiki rights therein, and of all the water flowing in the streams and ditches thereon over and above the portion that the kalo or wet lands of the kuleanas are entitled to by prescription; and that the defendant has unlawfully tapped kalandiauwai by means of a flume and thereby diverted large quantities of water and still does so and therewith irrigates kula lands not entitled to water. Other allegations which are covered by a general plea in bar to the whole bill are in substance, that 126 acres and more belonging to the plaintiff in the lower part of the valley are kalo lands entitled to a continuous flow of water; that during the last three months the defendant has unlawfully diverted and still diverts large quantities of water from said stream and has used

and is still using the same for irrigating kula lands not entitled to water, and has also unlawfully run said water into large reservoirs and has thereby deprived the said kalo lands of the plaintiff of water to which they are entitled. Besides the specific pleas in bar to particular allegations there are general pleas to the whole bill to the effect that all acts of the defendant complained of were and are in the exercise of its rights which were or might have been adjudicated in the former decision including the right to all the water in the stream each day except Sunday, and to store or use in reservoirs or otherwise its proportional share of the surplus water of the stream and of Sunday day water.

We will assume that the matters formerly decided are the same so far as they go as the matters now in dispute, as, for instance, that the dams and flumes are the same in the two cases. Then, as shown above, it is *res judicata* that the dam was lawfully constructed and maintained by the defendant, but not that the defendant can take water whether prescriptive or surplus, from above the dam to lands, whether kula or kalo, that have no prescriptive right to water from that point. It is *res judicata* that the tapping of kalaniauwai by means of a flume and the taking of water thereby to the kula lands to which it was formerly taken by the defendant is lawful, provided it still desists from using a sufficient quantity of water on its other lands then uncultivated but having prescriptive water rights, but not that it can lawfully so take more water either surplus or prescriptive than formerly or even the former amount if it has resumed the use of water on such other lands or even additional water in lieu of using water on other lands having prescriptive rights, whether since acquired or then owned and not included in those then owned and uncultivated. It is *res judicata* that the alleged 126 acres and more of kalo lands belonging to the plaintiff in the lower part of the valley are not entitled to a continuous flow of water, and that the defendant has the exclusive right, subject to the exceptions mentioned in the former decision, to the day water, except on Sunday up

to the amount to which its former estate was entitled by prescription even though that was at times all the water in the stream. It is not *res judicata* that the defendant is entitled by prescription, subject to the above mentioned exceptions, to all the water, however much there might be, in the stream during the times above mentioned, or that the defendant is entitled to a proportional share or any share of the surplus or Sunday water, or that it is not so entitled.

It follows that the former decision is not a complete bar to the present suit and does not cover completely the several acts now complained of in bar to which that decision is pleaded. It may be relied on as far as it goes but beyond that the questions are still open.

The decree sustaining the plea is set aside and the case remitted to the Circuit Judge for further proceedings.

A. S. Hartwell, Hatch & Silliman and Robertson & Wilder for plaintiff.

Kinney, Ballou & McClanahan for defendant.

RICHARD T. RICKARD *v.* KEAHONUE RICKARD.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 7, 1902. DECIDED FEBRUARY 21, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

On the trial of a libel for divorce based on the ground of the alleged adultery of the libellee, circumstantial evidence may suffice to prove the commission of the alleged offense; but when, as under the circumstances stated in the opinion, it is not a necessary inference from the other facts shown that adultery was committed, a finding by the trial court that the main allegation of the libel was not proved, cannot be set aside on the ground that it is contrary to the evidence or unsupported by any evidence.

OPINION OF THE COURT BY PERRY, J.

This is a proceeding for divorce instituted in April, 1901. The only ground upon which the prayer of the libel was based was adultery alleged to have been committed on December 1, 1900, and on divers days thereafter. The libellee in her answer denied the truth of the charge of adultery. At the close of the evidence offered by the libellant, the libellee, without offering any evidence, moved to dismiss the libel and this motion was granted. The case comes to this Court on a writ of error.

Two errors only are assigned, to wit: (1) in that the trial court held "that the libellant was guilty of connivance and did connive at the adultery of his wife and therefore should be denied a divorce," and (2) in that the trial court held "that the libellant had not sufficiently proven the adultery of the libellee." In view of our conclusion on the second point, it will be unnecessary to consider the first.

Evidence was adduced by the libellant tending to show the following: that the libellant and libellee were married in 1875 and ever since that time until December, 1900, lived together as husband and wife; that libellee is now an elderly woman; that five children were born of the marriage, of whom four were living at the date of the trial; that one Holmes, with whom the adultery is charged to have been committed, lives in a building situate a very short distance from and within view of the residence of the parties to this proceeding; that the building is two-story, the lower floor being used by Holmes as a store for the sale of general merchandise and the upper story containing his bedroom; that libellant has for a long time been a customer at said store and has there purchased goods amounting in all in value to "thousands of dollars;" that until the alleged occurrences now complained of libellant regarded Holmes as his "best friend"; that on one occasion, about two weeks prior to December 1, 1900, the libellant saw the libellee coming out of Holmes' store at about midnight; that libellant said to her at the time that he "would have no more of that nonsense" and

that she replied that "she didn't care, that in case I" (libellant) "would not look out for her, Mr. Holmes would look after her;" that the husband and wife continued to live together and had no quarrels; that on the night of Dec. 1, 1900, a moonlight night, from about 9:30 o'clock until about 10:30 o'clock libellant was under his own house on watch to see if his wife would go to Holmes' house; that at about the hour last mentioned, libellant saw a light "flash" in his own house and that a few moments later Holmes struck a match visible through the window of his bedroom and that shortly thereafter libellee walked, in her stocking feet, over to and entered Holmes' store; that at some time between 11:30 o'clock and midnight she came out of the store; that a few minutes later, at about midnight, Holmes was found in his house by the officer who arrested him; that while the libellee was in the building (what part of the building she was in, the evidence does not show) a light was burning low in Holmes' bedroom and that the window in said bedroom had no blinds or curtain or shade of any kind; and that when Holmes struck the match as above stated, libellant could plainly see him in his room.

It is contended that this was a *prima facie* showing of adultery, that, no evidence having been offered by the libellee, the trial court should have found the fact of adultery proved and granted the prayer of the bill, that the ruling that the allegations of the libel were not established was contrary to the evidence and unsupported by any evidence and that therefore a new trial must be ordered. There is no doubt that, if the trial court had found the fact of adultery as established, that finding could not have been set aside because the evidence was sufficient to support it. Circumstantial evidence may suffice to prove a charge of adultery as well as other facts in either civil or criminal cases; but while the court or the jury *may* infer the main fact from other facts proved, it is not *obliged*, in all cases, to draw such inference. So, in this case, while the trial court might properly have inferred the commission of the offense from the other facts proved and, if it had so found, its finding

would have been held supported by the evidence, still it was for it to determine, after hearing all the evidence, whether or not such inference was justifiable. The inference, while a possible one, was not a necessary one. All of the matters above stated could have occurred consistently with the woman's innocence; and if, upon all the evidence, the trial judge was not satisfied that the adultery was committed, we cannot say that he should have been so satisfied. It is well settled in this jurisdiction that the finding of the court in a divorce case is entitled to the same weight as the verdict of a jury. See, for example, *Bartlett v. Bartlett*, 13 Haw. 707, 713. Had this case been tried before a jury, it would have been error for the presiding judge, upon this evidence, to direct the jury to find the fact of the alleged adultery as proved. It would have been his duty to leave it to the jury to say whether or not the evidence satisfied them that the offense had been committed.

That the trial court said, in ruling on the motion to dismiss, that "the lying under the house waiting for the wife, to emerge and permitting her to enter" Holmes' house, was connivance, is not good ground for ordering a new trial, even though the ruling just quoted was erroneous as a matter of law. The court stated other reasons for dismissing the libel. One of them, it is apparent from the transcript of its oral decision on file, was that it was not satisfied on the evidence that the offense charged was committed.

The writ is dismissed.

Wise & Nickeus and *Thos. Fitch* for libellant.

C. C. Bitting for libellee.

DAVID KAWANANAKOA and JONAH KALANIANA-
OLE, Administrators of the Estate of Kapiolani, deceased,
v. L. K. PUAHI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 8, 1902. DECIDED FEBRUARY 21, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

K. employed P. "as collector and clerk to collect her rents, settle and pay bills, pay her servants and generally to attend to her domestic financial concerns under her order and direction and from time to time to make due and proper accounts thereof." P.'s employment in that capacity continued for two years and more, at the end of which time she was discharged by K. P. then instituted an action at law against K. for compensation alleged to be due her for her services. Shortly thereafter K. brought a suit in equity against P. for an accounting as to the moneys received and paid out by P. on K.'s behalf.

Held, that P. was a *quasi*-trustee for K. and that a fiduciary relation existed between the parties, that under the circumstances the court of equity properly took jurisdiction to determine the state of the account between them and that in so doing it took jurisdiction of matters not then before the court of law.

If jurisdiction has once been properly assumed, a court of equity may retain it throughout the litigation until full justice has been done between the parties, even though in so doing it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction. Equity in this case properly retained jurisdiction to determine the issues of compensation and of the lawfulness of the agent's discharge and other incidental questions and properly enjoined the prosecution of the action at law.

Under the circumstances stated, P. was not entitled to a trial by jury under Section 3, Art. 6 of the Constitution of 1894 in force at the date of the institution of these proceedings.

OPINION OF THE COURT BY PERRY, J.

This is a proceeding in equity instituted by Kapiolani on May 7, 1896. The original complainant having since deceased, the administrators of her estate were substituted as parties complainant. Shortly prior to the date above named, the present respondent had brought an action at law against the original complainant wherein she claimed a certain sum of money as commissions for collecting for Kapiolani the sum of \$41,484.73. The present suit was then commenced, a part of the relief prayed for being that the prosecution of the action at law be enjoined.

The material averments of the bill are, in brief, that in October, 1893, Kapiolani employed the respondent "as collector and clerk to collect her rents, settle and pay bills, pay her servants and generally to attend to her domestic financial concerns under the order and direction of the petitioner, and from time to time to make due and proper accounts thereof"; that respondent entered upon the performance of her said duties and continued therein until January, 1896, when she was discharged for the reason that she did not properly and faithfully perform her duties; that respondent did not make a true and faithful return of all her collections; that, although requested so to do, she has failed to render an account of her collections and disbursements; that she has produced certain books and memoranda which are erroneous and do not agree with subsequent claims and statements made by her and which she has refused to explain; that respondent has filed an action at law against complainant, now pending in the Circuit Court of the First Circuit, for compensation for services rendered in collecting the sum of \$41,484.73 and that the books produced show that respondent has charged herself with only the sum of \$34,153.18; that the accounts in the matter extend over a long period and are extended and complicated and involve the misconduct of the respondent. The prayer is for an accounting, for an order to respondent to produce all memoranda and papers relative to the matter and to

pay over to complainant any balance found to be due and for an injunction as above stated.

The bill was demurred to on three grounds: (1) that the Court has no jurisdiction of the subject matter of the action, (2) that the complainant does not state facts sufficient to constitute a cause of action because the discovery sought can be obtained in the action at law, and (3) that the complaint is ambiguous, unintelligible and uncertain. The Court below overruled the demurrer and, after the filing of an answer denying material averments of the bill, appointed, on November 6th, 1896, a referee, authorizing and directing him to examine the account presented by the respondent with her answer, to examine witnesses on oath, and to report his findings on said account. The referee filed a report on May 20th, 1897, and on the 7th of August following a supplementary report. Upon a motion to confirm and upon exceptions, the court confirmed these reports with certain modifications ordered by it, and also heard the evidence on and determined the question of the contract for compensation and of the complainant's right to discharge the respondent. Finally, after reference to a Master to compute the amounts due between the parties upon the referee's reports, and the court's modifications and findings, a decree was entered, adjudging the sum of \$84.05 to be due by the complainant to the respondent upon a settlement of all matters arising between them with reference to the services and transactions in question, making perpetual a temporary injunction theretofore issued restraining the prosecution of the action at law, and settling the matter of costs and fees. From that decree the case comes to this Court on appeal.

It is not sought on this appeal to have this Court review any of the findings of fact made by the referee or by the Court below. The main point relied upon in support of the appeal is that the demurrer should have been sustained on the ground of lack of jurisdiction, the argument being that under Section 3, Article 6 of the Constitution of 1894, in force at the date of the institution of these proceedings, the respondent was entitled

to a trial by jury on the questions of the lawfulness of her discharge, her liability for acts done by other agents during her temporary illness, and the amount of compensation due her, and that the court of law having first taken jurisdiction of the matter, the court of equity, which is at best a court of concurrent jurisdiction in such cases, should not have interfered or ousted the court of law of jurisdiction.

The applicable portion of the section of the Constitution referred to is as follows: "Subject to such changes as the Legislature may from time to time make in the number of jurors for the trial of any case, and concerning the number required to agree to a verdict and the manner in which the jury may be selected and drawn, and the composition and qualifications thereof, the right of trial by jury in all cases in which it has been heretofore used, shall remain inviolable except in actions for debt or assumpsit in which the amount claimed does not exceed one hundred dollars."

The action at law, as appears from the records herein, was solely for compensation. Assuming that, under the facts and in view of the nature of the account, it would have been competent for the defendant in that case, in addition to matters of defense, strictly speaking, which it might have to the claim for compensation, to plead and prove by way of set-off the amount due her by Puahi of moneys collected and not accounted for, still it was not obligatory on her to do so. It would have been optional with the defendant in that action to follow one course or the other and if she had chosen to merely defend and not plead a set-off, she would not have been barred by such failure to plead from subsequently suing in some appropriate proceeding for the amount of the set-off. The court of equity, then, in assuming jurisdiction to determine the state of the account between the parties with reference to the amounts collected and to those paid out by the respondent as agent, took jurisdiction of matters not then before the court of law.

Leaving aside, for the moment, the question of compensation, equity had jurisdiction to ascertain the state of the accounts

between the parties. Section 1498 of the Civil Laws of 1897 (Statute of 1878) provides that our courts of equity may hear and determine "suits upon accounts when the nature of the account is such that it can not be conveniently and properly adjusted and settled in an action at law." It is conceded that the accounts in the case at bar are long and complicated and the record shows them to be such. If any account can come within the class designated in Section 1498, this is certainly one of them. However this may be, the jurisdiction can clearly be supported on another ground. The facts stated in the bill and proven by the evidence show that the respondent, in the employment in question, occupied the position of a *quasi-trustee* for her principal and that a fiduciary relation existed between the parties. In such a case, the principal may maintain a bill in equity against the agent for an accounting. See *Fowler & Co. v. Catton et al.*, 13 Haw. 487. In the decision in that case this Court quoted with approval from Pomeroy's Eq. Jur. the following language: "The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent without more—the relation not being fiduciary in its nature, and no obstacle intervening to a recovery at law—is insufficient to enable a principal to maintain the action against his agent. *

* * But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction;" and from *Marvin v. Brooks*, 49 N. Y. 75-76: "The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation." The averments of the bill were "that the plaintiff is a resident of London, England; that it made defendants the sole agents for the Hawaiian Islands, and entrusted to them large quantities of its goods for sale on commission with authority to sell the same, and to collect the money therefor; that the defendants have in their possession unaccounted for a large sum of plaintiff's money

so received; that said account is still open, unpaid and unsettled; that the knowledge relative to the amount of sales and money due is peculiarly within the defendant's knowledge." The Court, referring to a concession by counsel that, if the defendants had been authorized to reinvest or otherwise use the proceeds of sale of the property, a relation of trust and confidence would have existed between the parties, remarked that "this additional authority, it seems, would only make clearer the relation of the parties", i. e., as one of trust and confidence. The case at bar is a stronger one in that it contains the additional element there referred to and which was missing in the Fowler case, to wit, of authority in the agent to settle bills and to use the moneys collected in the settlement and payment thereof and in payment of servants' wages and otherwise.

The question of the respondent's liability for acts done by other agents during her illness was merely an incidental one, necessary to be determined in connection with and as a part of the accounting. As to the lawfulness of respondent's discharge and her right to compensation and the amount thereof, it is well settled that, if jurisdiction has once been properly assumed a court of equity will, as a general rule, retain it throughout the litigation until full justice has been done between the parties, even though in so doing, it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction. See Bispham's Eq., p. 53; 11 Am. & Eng. Encycl. Law, 2nd ed., 201; *Bellinger v. Lehman*, 103 Ala. 385 (15 So. 600); and *McDaniel v. Lee*, 37 Missouri 204-207. There was no necessity to remand the parties to a court of law for a determination of any of these questions.

Our courts of equity had this jurisdiction prior to the promulgation of the Constitution of 1894. Under the circumstances stated, this was not a case where trial by jury could have been theretofore demanded as of right. Defendant has not been deprived by these proceedings of any constitutional right granted under the section referred to.

It is also contended by respondent in her brief that the Master:

erred in failing to pass upon the question of her liability for the acts of one Kanakanui during her illness; but beyond the mere statement of the claim, no showing of error is made. We do not feel called upon, under the circumstances, to search the record for matter tending to establish that the alleged error was in fact committed and that it was prejudicial.

Other points suggested in oral argument have not been referred to in the brief and must be regarded as abandoned.

The decree appealed from is affirmed.

Kinney, Ballou & McClanahan for complainant.

J. A. Magoon and T. I. Dillon for respondent.

ADELAIDE SCHLIEF and JOHN SCHLIEF, her husband
v. JOSEPH CLARK, ALEXANDER LAZARUS,
HENRY SMITH, as Guardian of NAOMI LAZARUS,
a minor, and JOSEPH O. CARTER, as Guardian of
MADELINE H. K. LAZARUS and ELEAZER K.
LAZARUS, minors.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 16, 1902. DECIDED FEBRUARY 21, 1902.

A fee allowed an auctioneer in partition proceedings is reduced on appeal as being clearly excessive.

OPINION OF THE COURT BY FREAR, C.J.

The only point presented on this appeal by the defendants from a final decree in partition proceedings is in regard to the amount of the fees allowed to the commissioner and auctioneer.

The property was sold, in six parcels at auction, and the proceeds ordered divided because a partition could not be made

without prejudice to the rights of the parties. The purchaser of one parcel was excused and the auctioneer authorized to sell that parcel at private sale at the same price. He did so, but that sale also was set aside, and the parcel was again sold at auction, this time at a higher price. The sales amounted to \$29,205 in the aggregate, not including the two sales of one lot at \$3,000 each, which were set aside.

The Judge allowed the commissioner \$300, the auctioneer \$1148, counsel \$250, each of the two guardians \$150, besides costs of advertising, costs of court, etc.

It is contended first that as the Judge appointed the commissioner to make the sale and the commissioner employed the auctioneer, the latter's fees should be paid by the commissioner out of his fee, and not come out of the fund. The Judge confirmed the action of the commissioner in engaging the services of the auctioneer if he did not previously authorize it, and he did in fact directly authorize the auctioneer to conduct at least one sale, the private one that was set aside. Moreover in the final order he merely authorized the commissioner to pay the auctioneer's fee. After all, it is immaterial whether the Judge allowed the fee directly to the auctioneer or combined the two fees in the commissioner's fee, leaving the latter to settle with the auctioneer. The question of importance is that of the amount.

It is contended by the appellees that the amount is not appealable as that is a matter within the discretion of the trial Judge. It is true that much allowance must be made for the discretion of the Judge. Fees in matters of this kind often depend largely as to their amount on oral statements of counsel and on the knowledge that the Judge has of the whole course of the proceedings. Still when the amount is clearly excessive this court may alter it on appeal. *Estate of Alina*, 13 Haw. 389. In our opinion the amount was clearly excessive in this instance. The commissioner's fee may be sustained as within sound discretion, but that of the auctioneer should in our opinion not exceed

\$450.00. We cannot approve the practice of allowing extravagant fees out of the estates of others.

So much of the decree as allows a fee of \$1148.20 to be paid to the auctioneer is set aside and the case is remanded to the Circuit Judge for further proceedings in conformity with the foregoing views.

Andrews, Peters & Andrade for plaintiffs.

Russell & Watson for defendants.

J. A. Magoon and *T. I. Dillon* for the Commissioner.

Robertson & Wilder for the Auctioneer.

CECIL BROWN, ADMINISTRATOR OF THE ESTATE
OF DAVID B. SMITH, deceased, *v.* THE EQUITABLE
LIFE ASSURANCE SOCIETY OF THE UNITED
STATES.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 16, 1902.

DECIDED MARCH 8, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A letter need not be produced as the best evidence, when the question is, not what was in the letter, but what was said by one who read or purported to read in part from the letter.

Harmless error is not ground for a new trial.

A demand is not a condition precedent to a right of action on a policy of life insurance which by its terms is payable on receipt of satisfactory proofs of the death of the assured.

A demand at the home office of an insurance company is not a condition precedent to a right of action there or elsewhere, even though the policy is by its terms payable at the home office of the company.

Failure of the payee to attend at the home office of an insurance company to receive payment of a policy payable there would merely enable the company to avoid payment of interest and costs by showing that it was ready to pay at its home office and by paying the amount of the policy into court.

Retention of proofs of death by an insurance company and refusal to pay on other grounds entirely would prevent the company from setting up either that the proofs were not satisfactory in form or that there was no demand, if a demand would otherwise be necessary.

An action may be brought on a policy of insurance in one place though by its terms the policy is payable in another place.

Proofs of the death of the assured furnished by a temporary administrator inure to the benefit of the permanent administrator.

The "faith and credit" clause of the constitution does not make the mere commencement of an action in one jurisdiction a bar to a similar action in another jurisdiction.

A policy of life insurance is assets in the place where it is if the insurer is doing business there and can be reached there by process.

An assured was domiciled in this Territory at the time of his death and the policy was here. An administrator was appointed here, and afterwards administrators were appointed in New York. Proofs of death were furnished by the administrator appointed here and afterwards by the administrators appointed there. Action on the policy was begun here by the administrator appointed here and afterwards there by the administrators appointed there. The policy was payable in New York, but the insurance company was doing business here and could be reached by process here. Held, that the administrator was properly appointed here and properly brought action here, and that neither the appointment of the administrators nor the commencement of the action in New York was cause for abatement of the action commenced here.

OPINION OF THE COURT BY FREAR, C.J.

This is an action on a policy of insurance for \$25,000 upon the life of David B. Smith, deceased. It is brought by the administrator of his estate, who was appointed by a Circuit Judge of the First Circuit in this Territory. Another action has been brought on the same policy in the Circuit Court of the United States for the Southern District of New York by administrators who were appointed in the Surrogate's Court for the County of New York. The defendant company seems ready to pay the amount of the policy to the administrator rightfully entitled to

it, but does not care to pay it twice, and so defends in this action on the ground that it is liable to pay the administrators in New York, and, for aught that we know, is defending in New York on the ground that it is liable to pay the administrator here. If both defenses should prevail, it would escape payment altogether. This case was tried before a jury, which rendered a verdict for the plaintiff, and now comes here on exceptions taken by the defendant.

The first exception was taken to the ruling of the trial judge allowing the plaintiff to testify to what the defendant's general agent had told him as to the action taken by the defendant on receiving the proofs of death, even though the agent read a portion of what he said from a letter written by the defendant. The objection to this testimony was based on the ground that the letter itself was the best evidence of its contents. The judge ruled that the witness could not testify to the contents of the letter but that he might testify to what the agent said, whether the latter read or purported to read from a letter or not. This was not error. Even if, as defendant's counsel seem to contend was the case, the witness had been permitted to testify to the contents of the letter, it would doubtless have been harmless error, considering the whole case.

Exceptions two to seven inclusive were taken to the admission of testimony of the plaintiff to the effect that to his knowledge it had always been the usage of the defendant to pay its policies here, although by their terms they were payable in New York. Exception eight was taken to the admission of the testimony of the same witness to the effect that it was the usage here to make no other demand than by the delivery of the proofs of death. Whether such testimony was admissible or not, we need not say. See *Ins. Co. of N. Am. v. Hibernia Ins. Co.*, 140 U. S. 565 and *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439. If the admission of the testimony was erroneous, it was harmless error, in view of what follows in this opinion.

The exception that seems to be most relied on is the ninth, which was taken to the refusal of the court to grant a motion for

a non-suit based on the ground that no demand had been made on the company in New York prior to the commencement of this action. In our opinion no demand was necessary in New York or any other place. The company agreed to pay "on receipt of satisfactory proofs of the death of the said assured." This was the only condition precedent to the liability of the company to pay or to the right of the decedent's administrator to commence action, providing the policy was then in force. It is undisputed that proofs of the assured's death were received by the company before the commencement of this action, and they must be taken to have been satisfactory to the company, for it retained them without objection and based its refusal to pay on other grounds entirely. *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 709, and cases there cited; also *Crotty v. Un. Mut. Life Ins. Co.*, 144 U. S. 621. There is nothing in this policy that either expressly or by implication makes a demand, either in New York or elsewhere, a condition precedent to the commencement of an action on the policy. It is true, the policy was by its terms payable at the company's office in New York, and the debtor was not obliged to seek its creditor elsewhere. But the action might be brought here, for it is transitory, which is not disputed, and the only effect of bringing action, whether here or in New York or elsewhere, before attending to receive payment at the office in New York would be to enable the defendant to avoid the payment of interest and costs by showing that it was ready to pay at its office in New York and by paying the money into court, which it did not do. The right of action accrued upon the defendant's receipt of satisfactory proofs of death, without any formal demand. *Wright v. Vt. Life Ins. Co.*, 164 Mass. 302; *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; *Locklin v. Moore*, 57 N. Y. 360.

It may be added that the defendant's refusal to pay based entirely on other grounds, would, on the reasoning of the cases cited above in regard to proofs of death, constitute a waiver of the requirement of a demand, if a demand were otherwise neces-

sary. See also *Un. Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611. And it seems to have been held in New York that furnishing the required proofs is a demand for payment. 4 Joyce, Ins. § 3299, citing *Freeman v. National B. Soc.*, 42 Hun. 252.

It is contended further under this exception that the plaintiff, the permanent administrator, should have informed the company of his appointment and made a demand himself, and that a demand, if one had been made, by his predecessor, the temporary administrator, would not inure to his benefit. The proofs were furnished by the temporary administrator, though prepared by the plaintiff who was then acting for the decedent's daughter. The proofs and the policy were taken by the temporary administrator and the plaintiff together to the defendant's general agent, who forwarded them to the defendant in New York, and in due time, the plaintiff having meanwhile been appointed permanent administrator but not then having brought this action, the agent informed him that the defendant refused to pay the policy and returned the policy but retained the proofs. It is at least doubtful if the ground upon which the motion for a non-suit was based was broad enough to raise this question. But, however that may be, since a demand was not a prerequisite at all to a right of action, the contention is not sound. It is not contended that the permanent administrator could not have the benefit of the proofs of death furnished by the temporary administrator, and if it were, the contention could not be sustained. The policy contains no provision as to who should present the proofs, and certainly the temporary administrator was clothed with sufficient authority to furnish them, and the company did not base its refusal to pay the permanent administrator on the ground that he did not furnish the proofs. See *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580, 592.

The cases relied on *contra* under this exception, namely, *Thorn v. City Rice Mills*, L. R. 40 Ch. Div. 357; *Friend v. City of Pittsburg*, 23 Pa. St. 143; *Emlen v. Lehigh Co.*, 47 Id. 82 and *Fowler v. Catton*, 13 Haw. 487, are clearly not in point.

The remaining exceptions, ten to eighteen inclusive, so far as relied on and not already practically disposed of above, raise the question whether in view of the alleged facts that the policy was by its terms payable in New York, that the administrator here had assets in excess of liabilities, that administrators had been appointed there and had brought suit there on this policy, the court here was not without jurisdiction to proceed in this case, or at least whether it ought not to have yielded to the courts in New York either as a matter of comity or because required to do so by the "faith and credit" clause of the Constitution and Section 905 of the Revised Statutes enacted under that clause. These exceptions were taken to refusals to admit evidence, to refusals to give to the jury requested instructions, to the giving of other instructions, to the verdict, and to the refusal to grant a new trial.

Counsel seem to lay special stress upon the "faith and credit" clause of the constitution. That and Section 905 of the Revised Statutes might require us to regard the appointment of the administrators in the Surrogate's Court in New York as valid, provided that court had jurisdiction in the matter, but it would not require an abatement of this action merely because an action had been instituted in a Circuit Court of the United States even if that action had been commenced first. See *Smith v. Lathrop*, 44 Pa. St. 326; *Stanton v. Embrey*, 93 U. S. 548. The effect of the institution of that action would depend on the application of the doctrine of *lis pendens* and not upon that clause of the constitution. No judgment has been rendered in that action. It is immaterial to this case whether the appointment of the administrators in New York was valid or not. The appointment of the administrator here also was valid. The question is whether the administrator here should under the circumstances be allowed to recover on the policy. The appointment of the administrator here preceded the appointment of the administrators in New York. The proofs of death were furnished by the administrator appointed here before they were furnished by the administrators appointed there. Action was begun here before it was

begun there. The decedent was domiciled here at the time of his death and had long resided here, and so far as appears had never resided in New York. The policy was applied for here, was delivered here and was found by the present plaintiff here among the decedent's papers after his death. The rest of the decedent's property also was here. The administrator was appointed here on the petition of the decedent's daughter, who was his only heir. The administrators there were appointed on the petition of one of the decedent's aunts. The defendant has a place of business here and a general agent here. The policy is payable to the assured's administrator. Service of process was made on the general agent here who, we presume, is the person designated for such purpose by the defendant under the statute. (Civ. L., Ch. 130, since amended, Laws of 1898, Act 45.) At any rate, the defendant answered generally and did not question the validity of the service. Under these circumstances it would seem that, if there should be any yielding, whether by comity or under the "faith and credit" clause of the constitution or the doctrine of *lis pendens* or for any other reason, it should be by the courts in New York rather than by those here, and such would seem to be the view taken both in the federal courts and in the New York courts. At any rate, the action here was properly brought and the pendency of a subsequent action elsewhere is no ground for an abatement of the prior action here.

The leading case is that of the *New Eng. Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 136. In that case the assured was domiciled in Michigan when the policy was issued, but died in New York. Her husband afterwards removed to Illinois and took the policy with him. The insurance company was a Massachusetts corporation and the policy was by its terms payable at its office in Boston, but the company was doing business in Illinois and could be reached there by process. It was held that the policy was assets in Illinois, that the husband was properly appointed administrator there, whether there was other property there or not, that he might properly sue on the policy there and

that payment there would protect the company from paying a second time in Massachusetts or elsewhere.

In *Smith v. New York Life Ins. Co.*, 67 Fed. R. 694, the assured was domiciled in Illinois when the policy was issued and at his death. An administrator was appointed in Illinois, who brought suit there on the policy. The assured's wife, however, had removed to California where she was and had the policy at the time of his death. It was held, affirming 57 Fed. Rep. 133, that she was properly appointed administratrix there and could properly sue there on the policy notwithstanding the appointment and suit in Illinois.

In *Gamble v. City of San Diego*, 79 Fed. Rep. 487, it was held that where a state court has first acquired jurisdiction, a Circuit Court of the United States should either dismiss a similar action brought there or else at least suspend proceedings until the final action of the state court.

In *Stout v. Lee*, 103 U. S. 66, it was held that where a state court first acquired jurisdiction, its decree barred further proceedings in a Circuit Court of the United States in a suit begun after suit but before decree in the state court.

In *Sulz v. M. R. F. L. Ass'n.*, 145 N. Y. 563, the assured was domiciled in New York but was temporarily in California when the policy was issued. He was domiciled and had the policy in Washington when he died. An administrator was appointed and brought suit on the policy in Washington. Afterwards the assured's widow, who had remained in New York, was appointed administratrix and brought suit there on the policy. The insurance company was a New York corporation and the policy was payable at its office in New York city. It was held, reversing the trial court, that, as the Washington court had first acquired jurisdiction and the policy was there when the assured died, the New York court should refuse to entertain jurisdiction.

In *Equitable Life Assurance Society v. Vogel's Executors*, 76 Ala. 441, 52 Am. R. 344, the assured was domiciled in Alabama when the policy was issued and when he died. The policy was there also. The insurance company was a New York cor-

poration. It was held that the executrix appointed in Alabama could maintain an action on the policy there, although an administrator had been appointed in New York.

The exceptions are overruled.

W. A. Whiting and *W. J. Robinson* for the plaintiff.

Hatch & Silliman for the defendant.

THE TERRITORY OF HAWAII *v.* LILIUOKALANI and
JOHN H. WILSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 1, 1901.

DECIDED MARCH 11, 1902.

GALBRAITH, J., GEO. D. GEAR, CIRCUIT JUDGE, IN PLACE OF
FREAR, C.J., DISQUALIFIED, AND THOMAS FITCH, ESQ., OF
THE BAR, IN PLACE OF PERRY, J., DISQUALIFIED.

A royal patent issued in 1866 by Kamehameha V to land covered by the mahele of 1848, which describes the seaward boundary line as "running to the sea; thence along the sea at low water mark," conveys the land lying between high and low water mark within such boundary line, the king having power to convey land between high and low water mark.

The resolution of the Privy Council of August 29, 1850, did not have the effect of a law, as the Privy Council had no authority to enact laws.

The words, "koe nae ke kuleana o na kanaka" or, in their English equivalent, "reserving however the people's kuleana therein," as used in conveyances in this Territory, means a reservation of the house lots, taro patches, or gardens of natives lying within the boundaries of the land conveyed.

OPINION OF THE COURT BY CIRCUIT JUDGE GEAR.

This is an appeal by the defendants from a *pro forma* order made by a judge of the First Circuit Court overruling a demurrer to a bill in equity for an injunction.

The bill alleges title of the United States in and to the public lands in Hawaii, and that the right to the possession, use, income and benefit thereof is in the Territory of Hawaii.

The bill then sets out in *haec verba* Royal Patent number 5,588, issued March 23, 1866, by Kamehameha V. and alleges that defendant Liliuokalani claims ownership under said patent.

The patent describes one of the boundaries of the land as following a certain line "running to the sea; thence along the sea at low water mark to commencement."

The defendant Wilson is alleged to be a licensee or lessee of Liliuokalani authorized by her to remove sand and gravel from the land between high and low water mark, and the bill seeks to restrain either and both of the defendants from removing the sand and gravel, on the ground that the land between high and low water mark belongs to the Government and that so much of the royal patent as purports to convey land below high water mark is null and void, for the reason that Kamehameha V had no lawful power or authority at the time of issuing the patent to convey the same.

It will be seen therefore that the only question necessary to be decided is as to whether or not the king had power to grant and convey the land between high and low water mark.

The general rule of law is that the sovereign power of any country or state can make a valid grant to a private individual of land between high and low water mark.

Gould, in his treatise on the law of waters, says: "The state may grant to individuals or corporations the soil of public navigable waters," and cites many cases upholding this proposition. Gould on Waters, Sec. 36. But "an express declaration is necessary to warrant the inference that it was intended to permit the shore below high water mark to be converted into private property." *Idem*. "The United States, while they hold the country as territory having all the power, both national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters." *Idem* Sec. 40; *Shively v. Boulby*, 152 U. S., 1, 47, 58.

"Individuals may also acquire by prescription, against the Crown or State, the right to the soil of public waters. *Idem* Sec. 37.

"When the shores or flats of tide waters have become private property the title thereto may be lost by disseisin. *Idem*.

The same doctrine is laid down in the following text books and reported cases: Black's Pomeroy on Water Rights, Secs. 21, 238; Woolrych on Waters, p. 440; Hale *Deportibus Maris*, Chap. 4; *Mayor of Mobile v. Eslava*, 33 Am. Dec. 329; *Roberts v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *Gouch v. Bell*, 21 N. J. L. 165, 22 N. J. L. 44; *People v. Perry Co.*, 68 N. Y. 71; *Langdon v. New York*, 93 N. Y. 144; *Eisenbach v. Hatfield*, 12 Lawyer's Rep. Ann. 630; *Hess v. Miner*, 65 Md. 601, 5 Cent. Rep. 585; *Ward v. Ellis*, 6 Jones Law (N. C.) 183, 72 Am. Dec. 570; *Pike v. Monroe*, 36 Me. 309, 58 Am. Dec. 753; *Wrights v. Seymour*, 69 Cal. 122; *Church v. Meekin*, 34 Conn. 421a; *Peck v. Lockwood*, 5 Day, 26; *Parker v. Taylor*, 7 Or. 436; *Cadmody v. Rowe*, 6 C. B. 879; *Boston v. Lecran*, 56 U. S. 426; *Webb v. Demopolis*, 21 L. R. A. 62; *Abbott v. Treat*, 78 Me. 121; *Clement v. Burns*, 43 N. H. 609.

A grant of land bounded by high water "including all the shore to low water mark" will pass title to the shore. *Dillingham v. Roberts*, 75 Me. 469.

From a review of the above decisions we are satisfied that Kamehameha V had power to make a grant of land between high and low water mark. While it is claimed that Kamehameha V was a constitutional monarch it seems that he was little embarrassed by constitutional restrictions. By his own authority he abrogated the constitution of the kingdom that was adopted by Kamehameha III in 1852 and promulgated a new one to his own liking August 24, 1864. Such a monarch certainly possessed the usual powers of sovereignty conceded to constitutional rulers and had the right to convey the land between high and low water mark to the defendants' grantor.

The Attorney-General contends however that even if the general rule of law be as above stated, that at the time the deed in

question was made (1859) the king was not authorized under the law to award title to land below high water mark, because of a resolution of the king's privy council passed August 29, 1850, and if the deed or royal patents be construed to pass, by its terms, land between high and low water mark the king and his premier exceeded their powers and that so much of the deed as purports to convey the title to such land is null and void.

To sustain this contention the Attorney-General quotes the resolution of the privy council of August 29th, 1850, which reads as follows:

"Resolved, that the rights of the king as sovereign extend from high water mark a marine league to sea, and to all navigable straits and passages among the Islands, and no private right can be sustained, except private rights of fishing and of cutting stone from the rocks, as provided and reserved by law." 3 Privy Council Record, p. 425.

The Attorney-General argues that as this resolution was ten years prior to the Act of 1860 "for the relief of certain kono-hikis" who were entitled to lands under the great mahele of 1848 but who had failed to obtain their awards from the Land Commission, and who, by that Act, were given further time to procure their awards, therefore an award granted subsequent to the passage of the resolution of the privy council was subject to said resolution and void in so far as it attempted to pass title to land mentioned in the resolution.

This contention is without merit for two reasons, the first one being that the privy council had no power to enact laws. The only power they had at the time of the passage of this resolution was to advise with the king.

The powers of the privy council are provided for in the old Civil Code and are as follows:

"It shall be the duty of every privy councillor: (1) to advise the king according to the best of his knowledge and discretion. (2) To advise for the king's honor and the good of the public without partiality through friendship, love, reward, fear or favor. (3) Finally to avoid corruption and to observe, keep and

do all that a good and true councillor ought to observe, keep and to do his sovereign." Civil Code, Sec. 26.

The legislative power was in the house of nobles and house of representatives, and only by their combined action and assent could laws be passed. We find no power given by any statute empowering the privy council to enact laws.

But even if it be conceded that the privy council possesses such power and that the "Resolution" quoted had the effect of a law, we are of the opinion that it would not affect the award and patent in this case, as they relate back to and are determined by the great mahele of 1848, in pursuance of which they were issued.

The award and patent in question were issued under the Act of 1860 for the relief of certain konohikis, section I of the Act being: "The Minister of the Interior is hereby authorized to grant awards for their lands to all konohikis who have failed to receive the same from the land commission, provided that the names of such konohikis appear in the mahele book of the year 1848; and all awards so granted by said minister shall be equally valid with those of the land commission."

The case *In re Boundaries of Pulehunui*, 4 Haw. 239, held that an award of the land commission of land "by name" is intended to assign whatever was included in such land according to the boundaries as known and used from ancient times. The opinion in that case, written by Mr. Justice McCully, describes practically how the boundaries of awards designated by name are arrived at.

"After the surrender by Kamehameha III, in 1848, of the greater part of the land of the kingdom to his chiefs and people, the necessity of a speedy distribution of it in accordance with what may be called the feudal rights of the chiefs, required that awards of lands be made by name only without survey. No body of surveyors could have been found in the country or practically could have been brought here, who might have surveyed these large estates within the lifetime of half the grantees, so that every award should have been issued as of a tract defined by metes and bounds, or with even an approximate statement of the

acreage. The "mahele" or division was, therefore, made without survey. Tracts of land known to Hawaiians as an ahupuaa or ili were awarded to those entitled by name of the ahupuaa or ili. By such grant was intended to be assigned whatever was included in such tract according to its boundaries as known and used from ancient times.

"With the Hawaiians, from prehistoric times, every portion of the land constituting these islands was included in some division larger or smaller, which had a name, and of which the boundaries were known to the people living thereon or in the neighborhood. Some persons were specially taught and made the repositories of this knowledge, and it was carefully delivered from father to son.

"The division of the lands were to a great extent made on rational lines, following a ridge, the bottom of a ravine or depression, but they were often without these and sometimes in disregard of them. Sometimes a stone or rock known to the aboriginals and notable from some tradition, or sacred uses, marks a corner or determines a line. The line of growth of a certain kind of tree, herb or grass, the habitat of a certain kind of bird, sometimes made a division. Through some parts of the country which must always have been unfrequented by the general population, as thick forests, rough and barren mountain lands, their division lines lay, where they could be traced out by some persons at least in charge of the territory, whose business it was to know them."

"A principle very largely obtaining in these divisions of territory was that a land should run from the sea to the mountain, thus affording to the chief and his people a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top. But this mode of allotment had numerous exceptions, because some of the lands were for some reason not always understood, and perhaps arbitrary in the beginning, very wide at the top, cutting off a great number of other lands from the mountain; others in like manner wide in the low lands, cut off land from the sea.

"The contour of lands which have been surveyed and plotted is most irregular. The only general description would be that the lines are not rectilinear, and that there is no preference for

right angles. In size ahupuaas are found of from a hundred ~~acres~~ up to thousands, in several instances containing more than one hundred thousand and more than two hundred thousand acres.

"The statute which establishes the office of commissioner of boundaries prescribes that the holders of lands granted by name only shall apply to such commissioner for the settlement and determination of the boundaries of what is claimed, presenting a general description of them by "survey or otherwise." After notice to owners of adjacent lands, the commissioner sits to hear evidence of what are the ancient lines of the land in question, hearing what is offered by the petitioner and adversely to him by others whose interests are affected. He may aid his information by going on the ground, and is to endeavor to obtain all information possible to enable him to arrive at a just decision. An appeal lies to the Supreme or Circuit Court, on record of the evidence of witnesses before the commissioner, which may be supplemented by further testimony." 4 Haw. pp. 241, 242.

From this it will be seen that the great mahele of 1848 was a grant by name of certain tracts of land the boundaries of which were well known but not "defined by authority," and therefore it became necessary to provide for the settlement of the boundaries, in pursuance of which an Act was passed, in 1862, "To provide for the appointment of boundary commissioners."

By this Act, before a royal patent could issue on a land, a commission award of the boundaries of the land had to be ascertained as provided in the Act, and by Section 10 of the Act, the Minister of the Interior was forbidden to issue any patent on an award until the boundaries had been so ascertained.

The title of the owner in the lands passed by the mahele, although the award was not issued till long afterwards, it being necessary to reduce to a survey the boundaries of the grant, which boundaries were determined as of the time of the mahele, and the award and patent in this case therefore related back to 1848, two years before the resolution of the privy council was passed, and therefore were not affected by the resolution, even conceding it to have been valid.

The Attorney-General further contends that as the royal patent and award contained the words "koe nae ke kuleana o na kanaka" this reserved to the people all the rights below high water mark not expressly recognized as private rights, and that this reserved all rights excepting the rights to fish and the rights to remove coral rock. He states that the king was "authorized by the law and by the land commission award to issue the royal patent reserving however the people's kuleana therein. The people's kuleana was the land between high water mark and low water mark, which Kamehameha had no authority to alienate."

By reference to the statutes of 1845-46, Vol. 2, pp. 81, 94, it will be seen that the grants are to be made "subject to the private rights of the tenants, if there be any on the land," and on page 85 in a definite statement of the public rights to which the grant is subject, showing that the words "koe nae ke kuleana o na kanaka", have no reference to such public rights, but can only have reference to the house lots and taro patches and gardens of tenants living on land within the boundaries of the larger tract granted.

We are of the opinion that the words quoted have a well understood meaning as used in conveyances within this Territory and that they, as well as the English equivalent "reserving however the people's kuleana therein," mean the reservations of the house lots and taro patches or gardens of natives lying within the boundaries of the tract granted.

The order overruling the demurrer of defendants is reversed, and the cause remanded with directions to the trial court to sustain the demurrer and order the bill dismissed.

E. P. Dole, Attorney-General, for the Territory.

Robertson & Wilder for the defendants.

Hatch & Silliman as *amicus curiae* on behalf of defendants.

CONCURRING OPINION OF THOMAS FITCH, Esq.

I concur in the decision of the Court reversing the *pro forma* order of the First Judge of the First Circuit Court overruling a

demurrer to a bill for an injunction filed by the Attorney-General of Hawaii, in behalf of the Territory of Hawaii.

It is alleged in the bill that the title to all lands on the shores of the Territory between high water mark and low water mark, is in the United States Government, as the sovereign power, subject to certain private rights of fishing, and cutting stone from rocks, and that the Territory of Hawaii is entitled to the possession, control, management, use, income and benefit of said lands except certain portions reserved by executive orders of the President. The bill sets forth that the defendant Wilson, under a pretended authorization of the defendant ex-Queen Liliuokalani, is taking sand and gravel for commercial purposes from certain lands at Waikiki below high water mark, and will continue to do so unless restrained by injunction. The bill further alleges that the beach where said lands are, is a general bathing resort; that the tide lands are of immense value to the Territory for the health, recreation and pleasure of its citizens, and of tourists and others: that the carrying away of sand is greatly injuring and threatens to destroy the beach at Waikiki, and to render the land between high and low tide unfit for bathers, by reason of coral, and will thus work irreparable injury to the rights and interests of the Territory.

The bill sets out fully not only the alleged title of the Territory but the title of the defendant—ex-Queen Liliuokalani—acquired by conveyance from the patentee; it recites in extenso the Hawaiian Act of August 14th, 1860, for the relief of certain konohikis; it contains by stipulation the royal patent issued on the 23d of March, 1866, to the grantor of defendant, and appends thereto a translation thereof into English, and anticipating the objection that the royal patent which contains a description by metes and bounds, includes the land to low water mark along the sea-shore, the Attorney-General declares that the king had no lawful power or authority to convey the land below high water mark.

The habendum clause in the patent reads "To have and to hold the above granted land in fee simple unto the said A. Keo-

hoalole and his heirs and assigns, etc." The words "Koe nae ke kuleane o no kanaka" usually translated as "reserving however the rights of the people" contained in the Hawaiian version of the patent, are not included in the English translation, but, such omission evidently having been inadvertant, they will be considered as though they had been therein.

In my opinion the words "people's rights" as used in the patent, had reference to the house lots and taro patches of native tenants, and the word "reservation" had reference to their right to claim small tracts within the boundaries of larger ones (see Principles Adopted by the Board of Commissioners to Quiet Land Titles, Vol. II Statute Laws, page 73). The Attorney-General contends that among the "rights of the people" that were "reserved", was a right to use the tide lands for bathing purposes. He claims that the defendants by taking sand from the beach in front of their own premises, impaired the value not only of that beach, but of the beach in front of adjacent lands for bathing purposes. There is no allegation in the bill that the Territory owns any tide land adjoining that of the ex-Queen, and therefore the Attorney-General's claim of a right to interfere, rests solely upon the assumed duty of the Territory to protect an alleged public bathing privilege.

Without passing upon the right of a person who has gained a lawful entrance upon the beach below high water mark, to travel along the same, over the tide lands of any riparian owner, or littoral owner by grant of the same, or even to bathe upon the same, I doubt whether such a right, if it exist, extends so far that it can be used by the bather as a basis for an injunction restraining the riparian owner, or owner by grant from removing the soil for commercial purposes, even if such removal should result in denuding the coral rocks of their covering of sand, so as to make wading in the water less pleasant to the bather.

In no usage, decree, constitution or law of the kingdom of Hawaii can be found any mention of such a thing as a right or privilege of bathing. The land commission in its declaration of

principles governing its methods and its awards, which were enacted as and given the force of law, set out the prerogatives of the government and the rights of the public which were not intended to pass by its awards (Statute Laws, Vol. II, pages 81-94).

These, briefly stated, were "to forfeit for treason; to levy taxes; to encourage and even enforce the usufruct of the land for the common good; to provide roads and the like; to have the power of eminent domain." (Page 85, authority last cited.)

"To encourage and even enforce the usufruct of the land for the common good", was undoubtedly intended to cover the right of private persons and corporations to condemn land for quasi public purposes, and also the inalienable right, not only to conduct commerce over navigable waters, but to provide wharves and landing places for its accommodation.

It is inconceivable that even the primitive government in existence during the earlier period of Hawaiian nationality should have so legislated as to compel ships to anchor and unload their cargoes from lighters, lest the construction of wharves should lessen the comfort and convenience of bathers. No authority upholding such an assumed superior right of the public to bathe has been called to my attention and the only case I have been able to find on the subject holds against such a contention. *Blundell v. Catherall*, 5 Bam. & Ald. 268.

In that case Baily, Judge, after finding that there has never been such right under English law, goes on to say that the right claimed if it exists at all must exist upon every part of the seashore. "Every private building then erected upon the seashore and even wharves and quays would be an obstruction to that right and in consequence abatable. Every embankment by which land is redeemed from the sea would obstruct the exercise of this right and be a nuisance, and so would be the erection of stakes for holding nets, and yet how frequently such embankments are made and such stakes set up." The judge concluded by observing that the inconvenience which would result from such a right afforded to his mind a strong argument against its existence (5 Bam. & Ald. 304).

Abbott, Chief Justice, observes in a separate opinion that "in some parts of the coast where the ground is nearly level and the tide ebbs to a great distance embankments have been built, and thousands of acres gained from the sea for pastures and tillage." And he asks how such improvements could have been made without a destruction or infringement of this supposed right if it did exist? (Bam. & Ald. 310.)

It seems to me that this reasoning is entirely satisfactory, and that if the right of bathing, claimed by the Attorney-General, exists at all, it is subordinate to any other lawful use that the riparian owner, or owner by grant, may desire to make of the soil.

The decision of the First Judge of the First Circuit overruling the demurrer might be reversed solely upon the ground that while the right of navigation and the right of free fishery are public rights whose threatened invasion might be prevented by injunction, yet the privilege of using the tide lands for the purpose of bathing is not a public right which equity would enforce.

But in the case at bar, the Attorney-General places the claim of the Territory to an injunction not merely upon an alleged interference with the bathing rights of the public, but upon the broad ground that it was never in the power of the king to convey land below high water mark, and the question of the power of the king with respect to the disposition of the public lands is therefore the main subject for consideration.

Prior to the Bill of Rights promulgated in 1839 in the reign of Kamehameha III, the power of the king was restrained by usage only. Kamehameha I, by right of conquest became lord paramount of these islands. He was an absolute monarch. His will was law. He was the lord of life and death. He was unrestrained by any constitution. He was the owner of all the land in the kingdom, whether under the sea or above it. Kamehameha III, as his successor possessed technically the same absolute power and the same ownership of the soil. But by 1840 the influence of the early missionaries coupled with American and English enterprise, had developed the inhabitants of these

islands from a barbarous into a semi-civilized people. With the exception of the people of Japan no Asiatic or Malayese race ever exhibited such capacity for rapid assimilation and adoption of western civilization as the Hawaiians. In 1840 the first constitution was adopted. All of the law, prior to Volumes I and II of the statute laws, was gathered into a little volume by Rev. William Richards entitled "The Constitution and Laws of 1840." It contains translations of the various acts, promulgations and declarations of the constituted authorities down to the year 1842.

There were no allodial titles here under the ancient system, and feudal holdings, not unlike those of Europe, save the military features, alone existed. The right of possession of the larger tracts of land passed with the gift of the sea frontage which was of the greater value because of the right to take fish. On page 26 of the Rev. William Richards' little compilation will be found the last feudal declaration of the king. He declares that he takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion to the common people, another to the landlords, and a third he reserves to himself. After giving certain grounds by name to the people, by which word is meant the common people or tenants, he declares, "But the fishing grounds from the coral reef to the seabeach are for the landlords and for the tenants of their several lands and not for others. But this exclusive right does not extend into the deep sea beyond the coral reef." (Page 29, Richards' Volume.)

It appears from these authorities that in the earliest days exclusive individual rights in the non-navigable waters were given and recognized by the sovereign. These exclusive rights however, did not extend beyond the coral reefs which are the natural barriers of commerce where reefs exist.

Volumes I and II of the statute laws of Hawaii are a compilation and a code. They are of a wholly different character from the group of promulgations published in the constitution and laws of 1840. They are based on English ideas and were evi-

dently written by men who were more or less familiar with American law.

We may draw enlightenment on most subjects from the decisions of English and American courts, but there is little occasion to resort elsewhere than to the written and unwritten laws of the Hawaiian kingdom in order to ascertain the rights of the king either individually or in his representative capacity to the lands between high and low water mark. We cannot look to the civil law for precedent, for these islands were never owned, claimed or colonized by any Latin power or people. Neither can we depend altogether upon the common law of England, for, although largely controlled by American influence, Hawaii was never either an English or an American colony, and even if it had been, it could not be assumed in the absence of statutory adoption that the common law of England as it existed in 1776 ever came here and abided here unchanged, for the common law of England is less a system than a growth. It is not a collection of fixed rules but an adaptation of elementary principles to changing conditions, and it draws its maxims alike from the pandects of Justinian and the edicts of Saxon kings. Yet in many particulars the political and social history of Hawaii resembles that of Great Britain. The English people were centuries in passing from the iron collars of Cedric to the pledge of Magna Charter, while Hawaii made the transit in half a century.

Even under the common law of England the crown never possessed a title to the tide lands that it was not able to alienate. Those lands were subject to the right of all persons to use the waters flowing over the same for the purposes of navigation and fishery, unless restrained by law; but the bed or soil belonged to the crown, and could be alienated by the crown, and in very many instances the tide lands belonged and to this day belong by grant or by immemorial usage, or by virtue of riparian rights, to the lord of the manor fronting on the sea.

In Meyer's Federal Decisions, Sec. 37, Vol. 23, it is said: "The soil on which the tide ebbs and flows may be parcel of a manor. When the sea flows admiralty has jurisdiction but when

the sea ebbs the land may belong to a subject, and everything done on the land when the sea is ebbcd shall be tried by common law, for it is then parcel of the country and *infra corpus comitatus*."

The exclusive right of taking fish as far out as the coral reef extends, or, where there are no reefs, then for a distance of one geographical mile from low water mark, is recognized and confirmed by Hawaiian law in the landlords "whose lands by ancient recognition belong to the same." It will be observed that with the ancient Hawaiian, the idea prevailed in marked contrast with our own traditions, that the land belonged to the fishery, not that the fishery was incident to ownership of the land (Vol. 1, page 90, Laws of Hawaii).

In support of the grounds assigned by the Territory for asking an injunction in this case, the Attorney-General claims:

1st. That by the constitution of 1840 it was declared that Kamehameha I. held all the lands in the islands but not as his private property; that the lands belonged to the chiefs and people in common, of whom Kamehameha I. was head.

2d. That the great mahele of 1848, which divided the lands between the king, chiefs and people, did not alter the character of the lands; that they remained crown lands, or public lands, and that no grantee could obtain a title to any other or greater rights than the grantor possessed.

3d. That the privy council on August 29, 1850, passed a resolution declaring "that the rights of the king as sovereign extend from high water mark a marine league to sea, and no private right can be sustained except private rights of fishing and of cutting stone from the roads as provided for and reserved by law."

4th. That by virtue of the privy council resolution of August 29, 1850, the king and his premier were divested of any authority to convey a title to lands between high water mark and low water mark; and so much of the deed of the king and premier made in 1856 to appellant's grantors as purports to convey such lands is null and void.

In order to dispose of this contention of the respondent, it is not necessary to inquire whether the exposition, contained in the constitution of 1840, of the principles on which the dynasty of the Kamehamehas was founded, deprived the reigning king of that individual ownership of all lands which Kamehameha I. obtained by right of conquest. In the great mahele of 1848 the absolute title in fee of the king as an individual, in one-third of all the lands, was conceded and granted. But admitting for the purposes of argument that from the inception of the kingdom all the lands belonged to all the people, it yet does not appear that the law debarred the people from granting through the king, to private individuals the public lands between high water and low water mark. The restriction on the granting power attempted to be made by the privy council resolution of August 29, 1850, was no restriction at all, because the constitution of 1840 expressly provides that no law shall be passed without the assent of a majority of both the house of nobles and the house of representatives. The privy council was a body with executive not legislative functions (Civil Code 26) and there are many reasons why the resolution of 1850 found in Vol. 3, Records of the Privy Council, page 425, ought not to be accepted as a full statement of private and public rights in the waters surrounding these islands, the most obvious of which is, perhaps, that it has no reference to the great subject of commerce and commercial needs. The resolutions of the privy council were not required by law to be kept among the public archives. The public did not contract with a view to privy council resolutions, nor was any one required to take notice of them. The proceedings of the privy council were always kept more or less secret, and any privy council resolution ought to receive very little recognition as a declaration of public and general custom.

Western civilization is now rapidly extending its spheres of influence in the eastern hemisphere. A commerce of incalculable extent and value is being developed between the lands whose shores are washed by the vast eliptic of seas which extend from Valparaiso to Vladivostok, from Alaska to New Zealand.

Hawaii is almost the centre where the currents of commerce must meet. Maritime cities will necessarily be developed here. Are piers, and wharves, and dry docks to remain unbuilt, and is progress to be checked if not destroyed by a fishing resolution of the advisers of Kamehameha passed fifty years ago?

As the privy council resolution of 1850 was not law, not having received the approval of a majority of either the house of nobles or the house of delegates, it could not limit or extend the rights of the king, either as an individual or as a monarch, over tide lands.

If the power of the crown to alienate tide lands in favor of private individuals existed in the crown by the analogies of the common law of England, and by ancient Hawaiian law, traditions, and practices, and was not (because under the constitution it could not be) taken away by the privy council resolution of 1850, then how and when and where did the crown lose it?

On page 107 of Vol. 1. of the Laws of Hawaii will be found the law creating the commission to quiet land titles. It was this commission that, with the exception of a few awards made to chiefs by the Minister of the Interior, under the Act of August 24, 1860, for the relief of certain konohikis, settled and established the inception of private land titles in this Territory. It was authorized to ascertain and establish the titles of private individuals to all the landed property in the kingdom. It was organized in the year 1846 and continued its work under general authority until the year 1854, after which time it heard and awarded by special authorization certain claims of konohikis or chiefs.

This commission was a court with jurisdiction to hear and dispose of all claims to private lands. Royal patents were issued upon these awards, but were of a ministerial character and neither conveyed nor confirmed title (*Bruns v. Minister of Interior*, 3 Haw. 787).

An Act of June 19th, 1852, provided that the board might grant large tracts by name without survey, and the Act of

August 23d, 1862, provided for the appointment of a boundary commission which was empowered to take evidence, survey the lands and fix the boundaries, and the Minister of the Interior was expressly prohibited from issuing any patent in confirmation of an award until the boundaries were so ascertained.

This court, in the matter of the boundaries of Pulehunui (4 Haw. 239) considering and construing this act, held that in granting these large tracts it was intended to include whatever was included in the tract according to its boundaries as known and used from ancient times. From prehistoric times every portion of the lands constituting these islands were included in some division, large or small, which had a name, and of which the boundaries were known to the people living thereon or in the neighborhood. These, the land commission awarded, and, in the case of large tracts the boundary commissioner defined. Both were judicial determinations, and were the only legal mode of confirming and fixing boundaries, and, when pursued were binding upon the whole world. The grant in this case was made specifically to low water mark, but if it had been made to "navigable waters" it would in my opinion have conveyed the tide lands between high water and low water mark.

This court has held that the title to the soil beneath navigable waters is in the state and is inalienable (*King v. Oahu Railway and Land Company*, 11 Haw. 717-725). But this court did not in that decision, or in any other, define navigable waters as waters flowing over tide lands; nor would such a definition be in harmony with the conditions existing on these shores or with the weight of American authority. The semi-diurnal or free tide wave produced by the action of sun and moon, ebbs and flows in about twelve hours and twenty-four minutes. In high northern latitudes land which is bare at low tide may be covered at high tide with sufficient water to float a line of battle ship, while on the shores of Hawaii, the tide lands are, even when the sun and moon are in conjunction and the time is near the equinoxes, rarely covered with sufficient water to float a fishing boat.

The reasonable definition of the term "navigable waters" is

that only waters which are navigable in fact are "navigable waters." Such was the rule in the earliest English cases and many titles have been recognized by the English courts as valid which included tide lands adjoining ancient manors. Later a dicta, many times repeated, stated that by the common law all waters, where the tide ebbed and flowed were navigable and public or royal waters.

But the courts in the United States, while occasionally repeating this dicta, have almost uniformly denied its application to our situation, have refused to adopt it as a test, and have declared that it was only adapted to the rivers and estuaries of Great Britain. So that the rule has come to be recognized everywhere, save in New England, that only those waters are navigable in law which are navigable in fact (*Willow River Club v. Wade*, 42 L. R. A. 305).

Conceding that the soil under the navigable waters belong to the United States as the successor in sovereignty of the Republic and the kingdom of Hawaii, to whom does the soil lying between the shore and the line that divides the navigable and non-navigable waters belong? How is the line dividing the navigable from the non-navigable waters to be determined?

There have been two lines of reasoning employed to define the non-alienable rights of the public and those of riparian owners. Some courts have held, the Supreme Court of Wisconsin for instance, that the adjoining riparian owners have the title to the soil, subject to the public easement of navigation; others, the Supreme Court of Minnesota for instance, that the title to the soil remains in the state until the land is filled in and reclaimed. But these latter courts also hold that the riparian owner has a right to fill in, to remove the soil, to convey, and to use the land, provided he does not interfere with the dominant right of public navigation (*Willow River Club v. Wade*, *supra*; *Bradshaw v. Duluth Imp. Mill Co.*, 52 Minn. 59; *Gilbert v. Emerson*, 55 Minn. 254-260; *Miller v. Mendenhall*, 43 Minn. 95; *Yates v. Milwaukee*, 10 Wall, 497).

The Supreme Court of the United States in those matters follows the decision of the local or state courts. (*Kankana Water Pincer Co. v. Green Bay Corral Co.*, 142 U. S. 254; *Parker v. Bird*, 137 U. S. 661; *Hardin v. Jordan*, 140 U. S. 371-382.)

In view of the decision of this court in *King v. Oahu Railway and Land Co.* I am of opinion that the result reached by both lines of reasoning is best expressed by holding that the soil under waters navigable in fact belongs to the United States, and that the soil between the shore and the line dividing the navigable from the non-navigable waters is in the riparian owner, or owner by grant.

How is the line defining the navigable from the non-navigable waters to be determined?

The Constitution of the United States gives Congress the control of commerce, and Congress has authorized the Secretary of War to establish harbor lines (1 Eupp. Rev. Stat. U. S. 802; Gould & Tucker, Notes, 608-614).

Where lines have been established by the Secretary of War they are conclusive. Where no lines have been established the riparian owner's right to reclaim extends to the line of practical navigation. The line of practical navigability has been well defined by the United States Court of Appeals of the Seventh Circuit in the case of *Illinois v. Illinois Railway Co.*, 91 Fed. 955. The circuit court there said:

"The extent of this riparian right" (to build wharves and dredge slips) "is a relative question. A pier that might have met the conditions of commerce fifty years ago would be wholly inadequate at the present time * * * Regard must be had to the object for which the right is conferred. It is to reach out to accommodate the vessels that plow the waters of the lake. It is in aid of the commerce of the lake, and that right for that purpose should be liberally interpreted and upheld."

I am therefor of opinion that in this Territory, in the absence of established lines, the right extends far enough out to accommodate deep sea-going ships.

The bill of the Attorney-General shows that in this instance

there was an award and grant including the land between high and low water mark. In England and America the right of the state to convey tide lands has been frequently recognized and upheld (*Waverly Water Front Co. v. White*, 45 L. R. A. 227; *Sale v. Pratt*, 19 Pick, 197; *Church v. Meeker*, 34 Conn. 427; *Nudd v. Hubbs*, 17 N. H. 526).

This Court is required by the decisions of the Supreme Court of the United States to recognize all vested rights, including those to the soil under public navigable waters, if any exist. (*Knight v. U. S. Land Association*, 142 U. S. 182; *San Francisco v. Leroy*, 138 U. S. 666.)

The Attorney-General in his argument insisted that the propositions I have attempted to discuss are inapplicable because there was no power in Kamehameha to make the grant to the grantee named in the patent. It is an all sufficient answer to say that the grant was an award duly made, upon which the patent issued, presumably after the boundaries of the ancient right had been ascertained by a boundary commission. And in the absence of anything to the contrary the law will presume that to have been done which the law required to be done.

TERRITORY OF HAWAII *v.* AH QUONG.

ORIGINAL.

SUBMITTED MARCH 3, 1902.

DECIDED MARCH 14, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A decision overruling a plea of former conviction is interlocutory and cannot be taken to the Supreme Court on exceptions before the final disposition of the case in the Circuit Court, except by permission of the Circuit Judge.

An exception to an interlocutory decision may, if reduced to writing in a summary mode and presented to the judge within the time prescribed by statute and allowed and signed by the judge, be brought to the Supreme Court after the final disposition of the case without a formal bill of exceptions though the usual and better practice is to have a formal bill of exceptions.

A trial judge may take a reasonable time in which to examine and pass upon a bill of exceptions after the expiration of the time within which it must be presented to him, but he cannot refuse to sign it until the final disposition of the case when he is satisfied with its correctness and the case may not be finally disposed of until long afterwards.

The Supreme Court may allow a bill of exceptions upon the refusal of the trial judge to do so, it being shown to be conformable to the truth.

OPINION OF THE COURT BY FREAR, C.J.

This is a petition (under Laws of 1892, Ch. 57, Sec. 74, Civ. L. Sec. 1438, as amended by Laws of 1898, Act 40, Sec. 2) for this court to allow exceptions which the Circuit Judge is alleged to have refused to allow or sign.

The defendant was indicted for rape. He pleaded a former conviction. The prosecution replied. The defendant demurred to the replication. The trial judge overruled the demurrer and plea and sustained the replication and held that the defendant must stand ready for trial. The defendant excepted and the exception was allowed. He presented a bill of exceptions within the term, paid costs accrued and made a deposit for costs to accrue, but the judge declined to allow or sign the bill of exceptions on the sole ground that there had been no final disposition of the indictment. This is the bill of exceptions that the defendant now wishes this court to allow. The facts are established in this court by affidavit. The prosecution stated in the Circuit Court and states here that it has no objection to the allowance of the bill.

The rule that only final decisions are appealable in the absence of statutory provision to the contrary, applies to criminal as well as to civil cases. A decision that a plea of former conviction is bad and that the defendant must plead over is interlocutory and

therefore not appealable; that is, it cannot be taken to the Supreme Court on exceptions until the final disposition of the case in the Circuit Court. After the final disposition of the case in the Circuit Court, the defendant may, of course, on taking the case to the Supreme Court on exceptions, rely upon his exception, if one were taken and allowed, to the decision overruling his plea in bar. On these points see *Prov. Govt. v. Hering*, 9 Haw. 181, 187; *The Queen v. Poor*, *Id.* 218, 219. Formerly interlocutory questions could be brought to the Supreme Court before the final disposition of the ~~case in the~~ Circuit Court only upon reservation of ~~the same~~ for the consideration of the Supreme Court by the presiding judge in the Circuit Court in the exercise of his discretion. See *The Queen v. Poor*, *supra*. That was done in the case of a plea of former conviction in *The Queen v. Lau Kin Chew*, 8 *Id.* 370. But now the judge may also certify bills of exceptions to the Supreme Court from interlocutory decisions. But this is a matter entirely within his discretion. Laws of 1898, Act 40, Sec. 2. Consequently we cannot allow any exceptions or bill of exceptions solely with a view to having the case brought at this stage to this court. No doubt that was the main object and no doubt it was so understood by the trial judge and it is now the main object of the defendant, and in so far as that object is concerned the trial judge was right in his view that his decision was not reviewable here as matter of right at present.

If the judge had signed and allowed an exception which had been reduced to writing in a summary mode and presented to him within the time prescribed by the statute, no formal bill of exceptions would be necessary, for the exception could, upon payment of costs and a deposit or bond for costs to accrue, be presented directly to this court after the final disposition of the case (*Kahului R. R. Co. v. Haw. Com. & Sug. Co.*, 11 Haw. 749) although the better as well as the usual practice is to bring the case here on a formal bill of exceptions.

But to enable the defendant to rely on the exception at all, that is, even after the final disposition of the case, it was neces-

sary not only that it should be noted at the time but that it should be reduced to writing and presented to the judge during the term or within ten days thereafter and be allowed and signed by him. The bill of exceptions in question was the only exception in writing that was presented to the judge to be allowed and signed by him. The defendant had a right under the statute to have this allowed and signed, if it was conformable to the truth, as to which there is no question, and the statute permits it to be allowed by this court upon the refusal of the trial judge to allow and sign it. The only question remaining would then be whether the refusal of the trial judge on the ground that there had been no final disposition of the indictment should be construed as a refusal within the meaning of the statute or merely as a lawful postponement of the allowance and signing. The statute does not require the judge to allow and sign the exception within the term or ten days thereafter, that being merely the time within which it must be reduced to writing and presented. The judge no doubt is entitled to a reasonable time in which to examine the bill or note of exceptions and decide whether it should be allowed or not. But the statute evidently contemplates reasonably speedy action. A judge would not be justified in declining to examine the bill and refusing to pass upon it for an indefinite time, much less would he be justified in refusing to sign it until some time in the distant future while satisfied as to the correctness of the statements contained in the bill. In this instance the judge evidently was of the opinion that the bill was conformable to the truth and yet he refused to sign it until at least the final disposition of the indictment. The defendant was not required to plead over at that term of the court and the next regular term would not be held until six months afterwards. Indeed, a case, especially a civil case, might not be finally disposed of for a year or in some instances even several years after the overruling of a demurrer or plea in bar, and the judge who ruled on the demurrer or plea might be dead or out of office before the final disposition of the case. In our opinion the refusal in this instance to sign the exceptions because the indictment

was not finally disposed of was a refusal within the meaning of the statute and, the truth of the allegations in the exception being established, the exception should be allowed. This of course, as already stated, does not mean that the exception can be heard in this court before the final disposition of the case in the Circuit Court, nor do we mean to imply that in order to bring the case here after such final disposition there it was necessary to pay costs and make a deposit or file a bond for costs to accrue before such final disposition there.

The petition is granted and the exception allowed.

Deputy Attorney-General J. W. Cathcart for the prosecution.

Smith & Parsons for the defendant.

KAU TING KEE *v.* YIM YOU.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 3, 1902.

DECIDED MARCH 19, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

While the statute permits amendments to pleadings in any matter of mere form or by adding or striking out the name of any party or by correcting a mistake in the name of a party, it is not error to refuse leave to amend a declaration by inserting the name of one or more persons in place of that of a sole party defendant, the effect of such amendment, if granted, being a change or substitution of parties defendant.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit instituted in the District Court of Koolaupoko, Oahu, for compensation for labor performed by the plaintiff for the defendant, at the latter's request, in 1900 and 1901. The defendant was named in the declaration as Yim

You. Service of summons was made as shown by the return endorsed thereon, on "Kealalaina and Ah Puck for Yim You." Judgment having been rendered for the plaintiff, an appeal was taken to the Circuit Court of the First Circuit, jury waived, the notice of appeal being signed "Yim You by their attorneys, Magoon and Thompson." In the Circuit Court, Ah Puck, making a special appearance for the purpose, moved that the action be dismissed as to himself on the ground that no service had been made either upon himself or upon the defendant. Counsel for the plaintiff thereupon moved to be allowed to amend the declaration "by inserting the name of Ah Puck instead of Yim You." The Court denied this motion giving as its reason for such denial that the amendment if permitted would constitute a change of parties defendant. Counsel for the plaintiff then asked for leave to amend the declaration "so as to read Kealina and Ah Pak, doing business under the firm name and style of Yim You." This request, also, was refused and, counsel for plaintiff having in the meantime stated in court that Yim You had been dead sixteen years, the motion to dismiss was granted. The plaintiff's exceptions now before this court are to the order of dismissal and to the denial of the second motion for leave to amend.

Our statute is liberal with respect to amendments, permitting such "in any matter of mere form, or by adding or striking out the name of any party, or by correcting a mistake in the name of the party." Where, however, by the proposed amendment a substitution of one or more persons for the sole party defendant is to be accomplished, it is at least not error for the trial court to decline to permit such amendment. In the case at bar the second proposed amendment is sought to be justified on the theory that the "Yim You" named in the declaration as the defendant was a partnership and that the omission of the names of the partners was a mistake, in a matter of mere form, which can under the statute be corrected. There is nothing in the record to bear out this theory; on the contrary, such indications as are to be found would seem to show that the Yim You against whom the action was brought was an individual. In the declaration no reference

to or suggestion of a partnership appears. The order in the summons is to notify Yim You that upon default judgment will be rendered against *him*. The return is that service was made on the two persons there named, not as co-partners, but *for* Yim You, presumably on the supposition that they were his agents or representatives. Counsel for defendant, in attempted avoidance of the motion to dismiss, asked to be permitted to insert in the declaration the name of Ah Puck instead of that of Yim You and, when the court intimated that that could not be granted because it would be a change of parties, added that he believed the statute allowed a change of parties, thus disclosing his own understanding that it was an individual who was being sued. The plaintiff's own testimony in the District Court was that he "worked with *him*" (meaning the defendant) from December 8, 1900, to June 25, 1901, and not that he worked with *them* or with the *firm* or *partnership*.

No waiver of the defect by general appearance or otherwise, has been shown. Kealalaina has not appeared at all. Ah Puck in the Circuit Court appeared specially and in the District Court, as shown by the Magistrate's record, did not appear for himself or as a defendant but merely for Yim You. The form of the signature to the notice of appeal is not sufficient to show an appearance by the two persons served or either of them. Moreover, the judgment appealed from is described in the notice as having been rendered against *this defendant* and not against *these defendants*.

In our opinion, the rulings excepted to were, under the circumstances, not error. The exceptions are overruled.

Russel & Watson for plaintiff.

J. A. Magoon and *T. I. Dillon* for Ah Puck.

J. M. VIVAS *v.* MELE AKONI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 3, 1902.

DECIDED MARCH 19, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under the circumstances stated in the opinion, the refusal to vacate a judgment obtained by default and to set aside the execution issued thereon held to be an abuse of discretion.

OPINION OF THE COURT BY PERRY, J.

The exception in this case is to a ruling of the Circuit Court denying defendant's motion to vacate the judgment rendered against her in that court and to set aside execution. The material facts, which are undisputed, are as follows: The action, being of assumpsit for \$30 for professional services rendered by the plaintiff for the defendant at her request in drawing certain leases, was instituted in the District Court of Honolulu on October 28, 1898. On the 7th of November following, the defendant appearing in person, trial was had before the magistrate, and judgment rendered for the defendant, and on the same day the plaintiff noted and thereafter, within the time prescribed by law, perfected an appeal to the First Judge of the Circuit Court of the First Circuit. It was not, however, until August 2, 1901, that the magistrate's certificate, dated June 19, 1901, and the record were transmitted to the Circuit Court. The latter court, without the intervention of a jury, heard the case on October 18, 1901, and rendered judgment for the plaintiff for the amount claimed. There was no appearance of or for the defendant at

this hearing, nor did she have any notice or knowledge that the trial would take place at that time. Execution was issued on the 30th day of the same month and on the 16th of November following the defendant moved to vacate the judgment and set aside the execution and in support of the motion filed an affidavit setting forth the fact that she had had no notice or knowledge of the trial in the Circuit Court, and also the further facts that she had had no notice or knowledge of the filing or perfecting of an appeal from the judgment in the District Court, that the first intimation she had of the trial in the Circuit Court was on November 7, 1901, when the execution was served on her and that she "has a good defense to said action inasmuch as she never directly or indirectly employed the said plaintiff to perform the services for her as alleged or any services and that she does not owe him the amount claimed in said action or any amount."

Whether an application for the vacation of a judgment is to be granted or refused, is a matter resting largely in the legal discretion of the trial court. Each case is to be determined in view of its own particular circumstances. The ruling of the trial court may, however, be reversed where there has been an abuse of discretion. Under the circumstances of this case, we think that justice required the vacation of the judgment and that it was an abuse of discretion to deny the motion. The failure to notify defendant of the taking of an appeal from the District Court, we deem of no avail to her now, for such notice was not required by any statute or rule nor was it even customarily given; it was open to defendant to ascertain the facts by inquiry at the proper place. Without fault, however, on the part of either the defendant or the plaintiff, the case had been delayed for nearly three years by reason of the magistrate's failure to certify up the record. That after this long delay the hearing was had without notice to the defendant and, so far as appears from the record, without any attempt to give her such notice, was not in conformity with the requirements of justice. To sustain such a course would be to permit a plaintiff to have an unfair advantage over the defendant, although in the case at bar

the record does not show that the plaintiff *intended* any such advantage.

The exception is sustained and the case remanded to the Circuit Court with directions to vacate the judgment and set aside the execution and for such further proceedings as may be proper.

Plaintiff in person.

Robertson & Wilder for defendant.

JONATHAN SHAW, Tax Assessor v. CHARLES W. BOOTH.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 15, 1902.

DECIDED MARCH 24, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

One does not cease to be the owner of a tract of land for the purposes of taxation by merely entering into an executory agreement to convey the same upon certain conditions not yet performed.

Under a statutory provision that different items of property and different interests in property should be assessed separately, an assessment in good faith to one person of a whole tract which was previously owned by him and which could properly be assessed as a whole to him if wholly owned by him is not wholly void merely because he had sold a small portion of the tract without the knowledge of the assessor.

In such case, as in cases of mere overvaluation, the sole remedy is by an appeal from the assessor to the tax appeal court and not by an action or defense in an action at law, and if the party has neglected to make a return as required by the statute he cannot appeal to the tax appeal court and has no remedy.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

Assumpsit for the collection of taxes. After judgment for the plaintiff in the District Court, the defendant paid all the taxes assessed to him except those in respect of one tract of real estate, and contested only the latter in the Circuit Court on appeal as he does now in this court on exceptions. This tract is known as Pacific Heights and consists in general of the ridge between Nuuanu and Pauoa valleys. It was assessed at \$100,000 for the land and \$50,000 for the improvements, and the amount in dispute is \$1,500 taxes and \$150 penalty for not having paid the taxes when due.

The first contention is that the defendant was not taxable at all in respect of this land for the reason that he had sold it to one C. S. Desky prior to the date, Jan. 1, 1900, as of which it was assessed. It appears, however, that he had not sold the land but had merely agreed to convey it provided Desky within eighteen months from the date of the agreement paid him \$50,000 and paid or secured the payment of \$50,000 more and performed certain other conditions such as laying out the tract into blocks and lots, making improvements, &c., the failure to do and perform which within the time limited, time being made of the essence of the contract, was to work a forfeiture of all of Desky's rights under the agreement. It is clear that the defendant remained the owner of the property and that Desky had merely a right to acquire it upon his performance of certain conditions. Under such circumstances the property was assessable to the defendant. *Tracy v. Reed*, 38 Fed. Rep. 69. See also *Howe v. Boston*, 7 Cush. 273.

It is contended further that the whole assessment was void for the reason that the defendant had actually conveyed a small portion of the land prior to the date as of which it was assessed—in pursuance of a clause in the above mentioned agreement to the effect that the defendant should, subject to certain conditions as to area, price and application of the purchase money, convey

portions of the land to such purchasers as might be procured by Desky. Of course if a portion of the land had been so conveyed (and for the purposes of this case we must assume that it had been) that portion should not have been assessed to the defendant. But can the defendant raise this question in this action? He did not make a return and so the assessor made "the assessment according to the best information within his reach." Civ. L. Sec. 872. It is not disputed that he did so make the assessment or that he did not know that the defendant had conveyed any of the land prior to the date as of which it was assessed. Nor is it contended that he acted fraudulently. Was not the defendant's sole remedy, if any, an appeal to the tax appeal court? Not having made any return he lost that right of appeal. Civ. L. Secs. 872, 875. At any rate he took no appeal to that court. The general rule is, both here and elsewhere, that when the statute gives a right to appeal in tax matters to a special court or board, such appeal is the sole remedy as to all questions that are within the jurisdiction of such court or board, but, of course, not as to other questions. In general, questions of judgment and fact are for the assessors and the specially constituted tax courts and questions of constitutionality, construction, procedure and applicable principles of law are for the regular courts. *Knudsen v. Stolz*, 8 Haw. 81; *Mika v. Knudsen*, *Id.* 196; *Parker v. Shaw*, 9 *Id.* 407. When the assessor includes in his list a small portion of land that does not belong to the person to whom it is assessed but which did belong to him as part of a larger tract, the greater portion of which still belongs to him, and the sale of the small portion of which was unknown to the assessor, is the remedy in the tax appeal court or in the regular courts? The classes of questions over which jurisdiction is given to the tax appeal courts are set forth in Civ. L. Sec. 875, which reads as follows:

"Any person whose name may appear on such tax list, who shall have made his return to the assessor as hereinbefore provided, and, if entitled to exemption, shall have claimed such exemption, and who may deem himself aggrieved by any change made by the assessor in the valuation of the property as re-

turned; or in the amount and character thereof, or whereby the amount payable by such person is increased beyond the amount which would be payable by him according to such return; or whose claim for exemption shall not have been allowed, may appeal from such assessment on lodging with the assessor or deputy assessor on or before the twentieth day of July, a notice thereof in writing, stating the grounds of his objection to the assessment or to any part thereof, and depositing therewith the costs of such appeal."

In construing a substantially similar section in *McBryde v. Kala*, 6 Haw. 529, Chief Justice Judd said:

"There can be an appeal taken where (a) there has been an excessive valuation by the assessor of the property returned; (b) or where the amount of the property is increased from the return (*here cases where property is assessed to a person who is not the owner are provided for*); (c) or where the character of the property is changed so that it is subject to greater taxation; (d) or where the amount of taxes to be paid is increased by the assessor beyond that payable by the appellant according to the return, without changing the character of the property (here errors in calculation can be corrected); (e) where statutory claims for exemption are not allowed by the assessor. * * * *Pure questions of over-valuation, or of including property of which the person sought to be held liable is not the owner, can be remedied by an appeal to the 'Court of Tax Appeal,' where these matters can be corrected, and there seems to be no reason to doubt that they cannot be corrected by resort to an action at law. See Hoice v. Boston, 7 Cush., 273; Lincoln v. Worcester, 8 Cush., 55; Cooley on Taxation, p. 528; Castle v. Luce, 4 Hawn., 63.*"

If that construction of the statute is correct it is apparent from the words that we have italicised that the defendant's sole remedy, if any, lay through an appeal to the tax appeal court. To the cases cited with approval in the opinion just referred to in support of this view we may add *Bourne v. Boston*, 2 Gray 494; *Salmond v. Hanover*, 13 Allen 119; *Davis v. Macy*, 124 Mass. 193, and *Altschul v. Gittings*, 86 Fed. Rep. 200.

It is true, the statute (Civ. L. Sec. 820) provides that "All real and personal property and the interest of any person in any real and personal property shall be assessed separately as to each

item thereof, "with certain exceptions not applicable to this case, and (Sec. 821) that "the interest of every person in any property shall be separately assessed." Under these provisions an assessment might be invalid if laid in a lump sum upon separate tracts even though they all belonged to the same person, or if it were laid to one person upon a single tract recognized as belonging to different persons, but not when laid upon a single tract as belonging to one person. In the *Mehrten* case, 13 Haw. 677, it was held that an assessment of the whole value of a tract of land to one could not be disturbed because of an interest of another therein unknown to the assessor, the person assessed not having returned her interest as such. If she had returned her interest alone doubtless the tax appeal court could have relieved her as to any other interest that the assessor might have added to her list. If the rule were as contended by the defendant, a person might neglect to make a return, leave the assessor to make the assessment and to bring suit, and then set up that the whole assessment was void because he had previously sold a small portion of the land or some interest therein without the knowledge of the assessor. In this instance it appears that the assessor did not know that the defendant had conveyed any of the land, that he made the assessment according to the best information within his reach, that he notified the defendant thereof, that the defendant then came to his office and talked the matter over with him and made no objection to the assessment of \$100,000 on the whole land and did not claim to have conveyed any of the land, and even expressed a willingness to pay the taxes on the \$100,000 for the land, but objected to paying those on the \$50,000 improvements, and then neglected to make a return though the time limited by the statute had not then expired.

If the defendant had no property whatever in the taxation district in question and if property were assessed to him there, he might be entitled to assert his right in the ordinary courts, for in such case he would be under no obligation to make a return in that district and there could be no legal assessment at all to him in that district. Such might possibly be the case also under

certain circumstances different from those in this case as to property not owned by him, even if he had other property in the district.

There are, it is true, expressions in some cases that appear to be opposed to the view we have taken, but they are mostly under statutes or facts essentially different from those involved in the present case.

The exceptions are overruled.

Robertson & Wilder for plaintiff.

J. A. Magoon and T. I. Dillon for defendant.

DISSENTING OPINION OF PERRY, J.

While concurring in the view that as between Desky and Booth the land was, under the circumstances stated, assessable to Booth, I respectfully dissent from the conclusion reached by the majority to the effect that the defendant may not successfully defend in this action by showing that the assessment of \$100,000 was upon a whole tract only a portion of which belonged to the defendant at the date of the assessment.

The contention that the assessment in question was upon that portion only of Pacific Heights the title to which remained in Booth on January 1, 1900, is entirely unsupported by any evidence. The undisputed testimony clearly shows, on the contrary, that the assessment was made on the whole of the tract of land known as Pacific Heights including the portions conveyed by Booth prior to January 1, 1900, as well as the remainder not so conveyed. In my opinion such an assessment is illegal and invalid. Our statute not only requires that the interest of every person in any property shall be separately assessed (Section 821, Civil Laws) but also that all real and personal property shall be assessed separately as to each item thereof. See Section 820. The return required to be filled by each person is only of the property *belonging to such person*. Section 870, Subdivision 1. An examination of the statute as a whole shows that it was the

intention of the Legislature to have assessed against each person only the property belonging to him and not that of others.

Indeed it would seem that this would be true as a general principle, in the absence of a statutory provision to that effect, where the object is a fair distribution of the burdens of taxation. Nor can this, I think, be held to be a case of a "mere informality" within the meaning of Section 890, which provides that "no assessment or act relating to the assessment or collection of taxes shall be illegal or invalidate such assessment or collection, on account of mere informality, nor because the same was not completed within the time required by law." It is a matter of substance and not of mere form.

"It is also generally made a requirement that separate and distinct parcels of land shall be assessed separately. This is certainly essential where the lands are resident or seated and owned by different persons each of whom has a right to know exactly what demand the government makes upon him. And a failure to do this is not a mere omission, defect or irregularity which can be overlooked, under a statute which provides that assessments for taxation shall be valid, notwithstanding any omission, defect or irregularity in the proceedings. * * * The reasons are sufficiently manifest. If separate parcels of land belonging to different individuals and presumably of different values, can be assessed together, neither of the owners has any means of determining the amount of taxes which is properly chargeable to his property, and consequently no means of discharging his own land from the lien, and of protecting his title, except by paying the whole of the demand, some undefined and undefinable portion of which is neither in equity nor in law a proper charge against him. Nay, when the two parcels are owned by the same person if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings." Cooley, *Taxation*, pp. 279-280. See also *Tracy v. Reed*, 38 Federal 69.

"An assessment of a whole tract to one who owns only a part of it is void."—Blackwell, *Tax Titles*, § 278. "An illegal assessment of real property imposes no obligation on the owner to pay the tax levied thereon and creates no lien on the real estate so assessed."—*Ib.*, § 194. See also *Barker v. Blake*, 36 Me. 433, 436; *St. v. Williston*, 20 Wis. 240; *Whitney v.*

Thomas, 23 N. Y. 285; *Hamilton v. Fond du Lac*, 25 Wis. 490-495; *Shimmin v. Inman*, 26 Me. 228, 233; and *Lane v. Janesville*, 20 Wis. 321.

It is contended on behalf of the assessor that the defendant cannot now avail himself of the defense sought to be presented, because, assuming that the assessment included property not of the defendant, the case becomes one of overvaluation merely, and that the defendant having forfeited his right of appeal to the Tax Appeal Court by his failure to make a return the assessor's valuation is conclusive upon him. Section 872, C. L. It would be deceiving one's self to call this a case of overvaluation. It is no more such than it would be if the assessor had in express words made an assessment of \$75,000 on the unsold portions of the land and \$25,000 on the remainder, assessing the whole to the defendant. In each instance the intent would clearly be to place the valuation of \$100,000 on the whole property and not on the unsold portion only; and after all it is the intent of the assessor in making the assessment, as expressed, which is to be ascertained.

While it is, in my opinion, open to the defendant to establish the fact that the assessment included land not his own, it would not be competent for the court to apportion the assessed valuation between the property of the defendant and that which was not his, for that would be the equivalent of placing a valuation on each of the classes of land, something which the court would not be authorized to do except on an appeal from the tax appeal court. It does not follow that the government is without a remedy, for under Sections 853 and 890, the assessor may now proceed to make a valid assessment of the land owned by the defendant on the date in question.

Section 875 of the Civil Laws, as I construe it, does not permit an appeal by a taxpayer to the tax appeal court with reference to property as to which he has made no return. The words, "or in the amount and character thereof," relate merely to property as to which a return has been made; they may refer, for example, to questions of area or as to whether a vehicle shall be

classed as one for the carriage of passengers or as one for the carriage of freight. *McBryde v. Kala*, 6 Haw. 529, is certainly to the contrary. Of that case, however, it may be remarked that the decision was by a single judge only and that the statements there made on the subject now before us were *obiter dicta*. The assessor may under § 853, "at any time add to his assessment or tax list any person or property theretofore omitted." If under that provision he assesses to one unreturned land belonging to him, that person has no right of appeal as to the valuation placed thereon by the assessor; if, on the other hand, the assessment so made is to one not the owner, then, in my opinion, such assessment is invalid.

The provision of § 872 that "if any person shall refuse or neglect to make said return, * * * the assessor may make such assessment according to the best information within his reach and the same shall be binding and conclusive upon all persons, and shall not be subject to appeal," does not, as I understand it, mean that the assessor may assess against A. the property of B. merely because he, the assessor, believes it to belong to A. "according to the best information within his reach," and that, in case of such assessment, A has no remedy at all because of his failure to make a return. The assessment which the assessor is by this section authorized to make "according to the best information within his reach," is that contemplated by the other sections of the statute, to-wit, of the property of A. against A. and it is with reference to *that* property that he is to use the best information within his reach. Nor was anything to the contrary decided in the *Mehrten* case, 13 Haw. 677. There the court simply held that where one has returned a parcel of land as his own, without any mention of any lease thereon, he is estopped from afterwards denying, on an appeal from the assessment on such land, that the land is wholly his own and from setting up that the land is subject to a lease and that he is the owner of the reversionary interest only.

In my opinion the exceptions should be sustained, the judgment for the plaintiff set aside and a new trial ordered.

OAHU RAILWAY AND LAND COMPANY *v.* J. W.
PRATT, Tax Assessor for the First Taxation Division of
the Territory of Hawaii.

SUBMITTED JANUARY 18, 1902.

DECIDED MARCH 25, 1902.

GALBRAITH AND PERRY, JJ.

A tax on income is in substance and effect a tax on the property producing the income.

Income derived from property exempt from taxation by contract, authorized by statute, is also exempt.

An annual subsidy granted by the Legislature is not "fairly necessary to the reasonable construction, operation and maintenance" of a railroad after the road is completed and being operated at a profit; nor is such subsidy exempt from taxation under a contract exempting all the property of the railroad "fairly necessary to the reasonable construction, operation and maintenance" of the railroad.

OPINION OF THE COURT BY GALBRAITH, J.

This is an original submission under the statute. The matter of difference which, as agreed in the stipulation, "might become the subject of a civil action" is the claim of right by the defendant to collect the tax provided for in Act 20, Session Laws 1901, known as the "Income Tax Law," from the income of the plaintiff corporation. Four specific questions are propounded by the submission as follows: (1) "Is the plaintiff wholly exempt from taxation on its income?" (2) "Is the plaintiff exempt from taxation on so much of its income as is derived from property fairly necessary to the reasonable construction, maintenance and operation of its road?" (3) "Is the plaintiff exempt from taxation on so much of its income as is derived from wharfage, storage, scales or subsidy as set forth in paragraph four of this submission?"

(4) "Is the plaintiff liable to taxation upon its entire net income?"

Paragraphs 3, 4 and 5 of the submission are as follows:

3. "That of the sum of \$900,846.83, gross income of said plaintiff as shown by schedule "A" of said return, the sum of \$610,206.89 was income derived from property which defendant admits is fairly necessary to the reasonable construction, maintenance and operation of said railroad; and that the sum of \$207,889.04 was income derived from property which plaintiff admits is not fairly necessary to the reasonable construction, maintenance or operation of said railroad."

4. "That of the remainder of said gross income, to-wit, the sum of \$82,750.90, the sum of \$31,386.34 was for wharfage collected from vessels not belonging to plaintiff, using the wharves of said plaintiff in Honolulu harbor while delivering freight to be carried over plaintiff's railroad and while loading freight from plaintiff's warehouse; the sum of \$5,196.37 was for storage collected from persons whose goods had been stored in the warehouse of plaintiff awaiting the arrival of vessels, but which had not been carried over the railroad of plaintiff; the sum of \$3,468.19 was received for the use of plaintiff's scales in freight shipped over plaintiff's road; and the sum of \$42,700 was a subsidy received from the government and paid to the plaintiff pursuant to the provisions of Chapter 31, of the Session Laws of 1890 (being Sections 581 to 584 of the Civil Laws, 1897)."

5. "That the contract entered into by the Minister of the Interior with the plaintiff's assignor, as hereinbefore set forth contains the following provisions pertinent to the issues involved in this controversy; 'That the said party of the first part does by these presents covenant and agree to and with the said party of the second part, his associates and successors and their assigns, and to and with such corporation as shall be formed or authorized by him or them as aforesaid, that no taxes shall be levied by the Hawaiian Government for the period of twenty years from the date hereof, upon the property of the party of the second part, his associates and successors or such company, which shall be fairly necessary to the reasonable construction, maintenance and operation of the said steam railroad or railroads.' Which exemption was authorized by said Chapter 62 of the Session Laws of 1888."

1. Counsel for the plaintiff makes no contention in regard to

the first question submitted and concedes that the exemption of income from taxation cannot extend further than the exemption of the property from which the income is derived and that a negative answer should be given to the first question.

2. It is contended on behalf of the defendant that income is a separate and distinct thing from the property from which it is derived and that although the exemption includes all property "fairly necessary to the reasonable construction, maintenance and operation" of the road, it does not follow that the income from such property is exempt and cannot be taxed. This contention may be ingenious but it can scarcely be considered sound. It is not material to the determination of the question presented whether or not the income and the property producing the income are one and the same thing. The real question is whether or not a tax on the income is a tax on the property from which the income is derived. If this last question be answered in the affirmative, the income produced from exempt property is clearly within the exemption. This ought not at this time to be regarded as an open question. The Supreme Court of the United States in *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, said: "The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income." At pp. 581.

Again on the rehearing of said cause Chief Justice Fuller speaking for the court said that a tax on the income from real estate "fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct." 158 U. S. 618.

In a later case the same court held "that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in the bill of lading." *Fairbanks v.*

United States, 181 U. S. 283, at p. 312. In the opinions in this last case there is an exhaustive review of the many decisions on this interesting subject.

In the light of these decisions it is clear that a tax on the income derived from exempt property would be in "substance and effect" a tax on the property producing the income and a violation of the terms of the contract, existing between plaintiff and the Government of Hawaii, exempting such property from all taxes for a term of twenty years. It follows that an affirmative answer must be returned to question number 2.

3. In answering the next question it must be determined whether or not wharves, warehouses, scales and the subsidy paid by the government come within the exemption, i. e. are they one or all, "fairly necessary to the reasonable construction, maintenance and operation" of plaintiff's railroad?

The statute authorizing the Minister of the Interior to enter into the contract with plaintiff's assignor for the construction of the railroad seems to set at rest any doubt relative to wharves and warehouses and possibly scales, coming within the exemption. The preamble recites that "railroads are essential to bring produce to safe ports" and section 3 (C. L. Section 532) authorizes the corporation, from time to time, to exercise any of the following powers: * * * "It may make such piers, jetties, stations, sidings, wharves, warehouses, toll-houses, and other houses, yards, engines, machinery, works and conveniences whatsoever connected with the railway as the corporation may think proper, and may from time to time, alter, repair, or discontinue any such apparatus, works and conveniences, and substitute others in their stead." (See also Section 561 C. L.)

In view of the specific authorization of the construction of wharves and warehouses and the fact that the principal use of the wharf and warehouse is to facilitate the operation of the railroad there can be no doubt that this property is "fairly necessary for the reasonable" operation and maintenance of plaintiff's road and is within the exemption. The fact that an additional and incidental use is made of the wharf and warehouse in excess of

that for railroad purposes cannot operate to take these appliances out of the exemption so long as the principal use thereof is for railroad purposes. *C. M. and St. P. Railway Co. v. Board of Supervisors*, 48 Wis. 665; *O. R. & L. Co. v. Shaw*, 12 Haw. 76, 80.

While scales are not specified in the statute above quoted still the company is authorized to make "other apparatus, works and conveniences whatsoever connected with the railway as the corporation may think proper." The broad discretion given the company by this statute in connection with the admission that the scales are used only to weigh freight shipped over plaintiff's railroad brings this property within the exemption.

Is the subsidy granted plaintiff's company within the exemption? Whatever may have been the necessity for this annual subsidy to aid in the construction of the road at the time it was authorized, it is clear now, that the subsidy is not "fairly necessary" or in any sense necessary or essential to the operation and maintenance of the road. It appears from the submission that the road is operated at a profit and that the subsidy goes only to increase the surplus earnings and the dividends declared. From these facts we conclude that the subsidy is not within the exemption. The answer we return to question number 3 is, that revenue derived from the wharf, warehouse and scales is within the exemption and that the subsidy is not and is subject to the tax as claimed by defendant.

4. What has been said in the discussion of questions 2 and 3 is sufficient justification for returning a negative answer to question number 4.

Let judgment be entered accordingly.

Hatch & Silliman for the plaintiff.

Robertson & Wilder for the defendant.

THE TERRITORY OF HAWAII v. JOE CASTRO and
GLORA ALMEDA.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED MARCH 12, 1902.

DECIDED MARCH 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a prosecution for adultery, an admission by one of two codefendants a short time before that she was then married to a third person, is competent and sufficient evidence of such marriage as against herself, but not as against her codefendant.

OPINION OF THE COURT BY FREAR, C.J.

The defendants were convicted of adultery under Pen. L. Sec. 89. They now contend that there was no evidence of the marriage of either of them.

The only evidence on this point was the testimony of the Deputy High Sheriff to the effect that the female defendant came to his office not long before, that she had trouble with her husband's brother, that she stated that she was a married woman and married to a man then working on Kauai, that she said she was married to a man who was then on Kauai, and that she herself said all this to the witness.

If either defendant was married to a third person each might be guilty of adultery under the statute. The admission by the female defendant a short time before that she was then married to a third person was competent and sufficient evidence of the marriage as against herself. See *Wiles v. U. S.*, 103 U. S. 304; *Com. v. Caponi*, 155 Mass. 534; *Williams v. State*, 54 Ala. 131

(25 Am. Rep. 665). But it was not evidence as against her co-defendant. *Com. v. Thompson*, 99 Mass. 444. This is conceded by the prosecution.

The judgment appealed from is reversed as to the defendant Joe Castro and affirmed as to the defendant Glora Almeda.

Deputy Attorney-General J. W. Cathcart for the prosecution.

J. M. Vivas for the defendants.

FRANK LILLIS *v.* JAMES CARTY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 11, 1902.

DECIDED MARCH 26, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The judgment below being supported by the evidence the exceptions are overruled.

OPINION OF THE COURT BY GALBRAITH, J.

This is an action for damages resulting to the plaintiff from an alleged breach of warranty on the sale of a horse. The defendant denied the warranty and also the sale to the plaintiff and maintained that he sold the horse to a third party who in turn sold it to the plaintiff. A jury being waived the cause was tried to the court. The court found that the plaintiff had failed to sustain the burden of proof imposed on him by law and did not prove the sale from the defendant to him and rendered a general judgment for the defendant.

The plaintiff excepted to the refusal of the court to make certain findings of fact supported by the plaintiff's evidence. These findings overlook entirely the evidence introduced on behalf of the defendant. Other exceptions were taken to the conclusion of law made by the court. These conclusions of course are not based on the facts set out in the plaintiff's exception but on those actually found by the court. The exceptions in this case only present one question and impose one duty on this court, i. e., to determine whether or not the evidence supports the finding and judgment of the trial court.

The judge says in the decision in part: "The court does not believe the plaintiff has sustained the burden of proof on all of the material facts in the case. Mr. Lillis is perhaps out and injured, but, there is no question in the mind of the court, under the evidence, that Lillis is not the proper party plaintiff, on the ground that there is not sufficient evidence to show there was a sale of this property to the plaintiff by the defendant. All of the documentary evidence tends to show, strongly, the contention of Carty: that the sale was directly to Peterson, and, taken in that view, it explains to the court why Peterson received the twenty-five dollars. * * * Upon all of the evidence there is only one way to find in this case. There is no question but what the horse was unsound. The defendant himself admits it. * * Assuming there was a warranty the court holds there is not sufficient evidence to sustain plaintiff's claim and must, under the law, and is compelled to decide in favor of the defendant and does therefore render judgment in favor of the defendant."

Under the well established practice in this court if the judgment of the court below is supported by the evidence in the record it must be affirmed. *Mellis v. Kunuiakea*, 9 Haw. 441-2; *Scott v. Silva*, 13 Haw. 184; *Scott v. Nahale*, *Id.* 255.

We find that the evidence does support the judgment of the court below.

The exceptions are overruled.

Peterson & Mathewman for plaintiff.

Kinney, Ballou & McClanahan for defendant.

EDWARD ARMITAGE *v.* E. F. BISHOP, Administrator of
the Estate of David Center, deceased.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED MARCH 12, 1902.

DECIDED MARCH 26, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When in an action of assumpsit the plaintiff is entitled, upon admissions contained in the answer, to judgment for a certain portion of the amount claimed, it is error to grant a motion for a non-suit.

OPINION OF THE COURT BY PERRY, J.

Assumpsit for \$472.50 for professional services rendered by the plaintiff, a duly licensed physician and surgeon, for the decedent during his last illness. One of the exceptions is to the granting, by the judge presiding at the trial, of defendant's motion for a non-suit, the motion and the ruling being based upon an alleged failure of proof of the rendition and value of the services.

In our opinion, the ruling excepted to was erroneous. Upon the defendant's own answer, the plaintiff was entitled to judgment. The main allegations of the declaration are the following, contained in paragraph 5:

"That the above named defendant, E. F. Bishop, as administrator of the estate of David Center, deceased, is indebted to the above named plaintiff in the sum of four hundred and seventy-two and 50-100 dollars (\$472.50), upon an account for the services of plaintiff rendered as physician and surgeon for the said David Center, deceased, during his life time, and at his request and upon the promise of the said David Center to pay so much as such services were reasonably worth, between the first day of November, 1900, and the second day of January, 1901, bill of

particulars of said account being annexed hereto and made a part of this bill of complaint, and that such services so rendered as aforesaid were reasonably worth the sum of four hundred and seventy-two and 50-100 dollars, and that the said claim is just, due and wholly unpaid."

Attached to the declaration is an itemized account for "medical services" rendered on twenty-eight different days commencing with November 1, 1900, and ending with January 2, 1902. These items are, one of \$1.00, one of \$3.50, eleven of \$9.00 each, six of \$10.00 each, one of \$11.00, one of \$12.00, one of \$15.00, one of \$21.00 and five, being for December 29, 1901, to January 2, 1902, inclusive, of \$50.00 each. The defendant in his answer, after admitting the truth of all the other allegations of the declaration but one,—the truth of that one was proven at the trial by undisputed evidence—says:

"That he acknowledges that proper compensation is due to the said plaintiff for professional services rendered to the late David Center during his late illness but that this defendant as administrator does not feel warranted or justified in paying the account as appended to said complaint, alleging the same to be excessive and unreasonable and more than the plaintiff is entitled to for the services rendered.

"That the defendant thinks and believes that \$7.50 per visit would be a proper charge for visits made to the deceased while lying ill at Spreckelsville on the Island of Maui, and whereas the plaintiff has charged in his account, visits at the rate of \$9.00, \$11.00, \$12.00, \$15.00 and as high as \$21.00 which this defendant believes is exorbitant and excessive and more than this defendant is warranted in paying unless by judgment of court, and whereas there appears in said account a charge of \$50.00 per day made by the plaintiff for accompanying the deceased to Honolulu, for 5 days beginning Dec. 29, 1900, and ending Jan'y. 2, 1901, which this defendant believes is exorbitant and excessive and more than this defendant is warranted in paying unless by judgment of court, said charges of \$50.00 per day for 5 days being unfair and unjust for the reason that immediately upon the arrival in Honolulu on the morning of Dec. 30th, 1900, the said David Center was then and there placed in the Queen's Hospital in charge of Surgeon C. B. Wood who immediately assumed charge and that the said plaintiff's services ended then

and there notwithstanding the fact that he was present as a spectator at an operation upon the said David Center at a subsequent date." In the concluding paragraph, the defendant prays, "that the claim for the amount set forth in the complaint may be denied and that the jury empanelled for hearing same may decide and fix the amount which in its opinion is properly due and payable to the said plaintiff the defendant admitting that he is entitled to proper compensation but alleging that the amount is in excess of his just rights."

Testimony was adduced showing that at the time of his death the decedent was assistant manager of the Spreckelsville plantation and was residing at Spreckelsville, ten or eleven miles distant from Wailuku, both on the Island of Maui, and that the plaintiff's home and office were at Wailuku. The answer admits that \$7.50 would be reasonable compensation for each visit made at Spreckelsville and, as we construe it, admits in effect that the items of \$9.00, \$11.00, \$12.00, \$15.00 and \$21.00 appearing in the account are all for visits made at Spreckelsville. Certainly the answer cannot be construed otherwise as to each of the items just mentioned except possibly the first, for the items of \$11.00, \$12.00, \$15.00 and \$21.00 appear in the account but once each. It is clear from the answer that the rendition of the services as alleged in the declaration proper and appended account, is admitted and that the defendant merely desired an adjudication by the jury as to the value of those services. The plaintiff was entitled, upon defendant's own admissions, to judgment in some amount and it was therefore error to grant a non-suit. The other exceptions need not be passed upon.

The exception considered is sustained and a new trial ordered.

G. Hons for plaintiff. •

J. A. Magoon and *T. I. Dillon* for defendant.

H. R. HITCHCOCK *v.* HAWAIIAN TRAMWAYS COMPANY, Limited.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 4, 1902. .

DECIDED MARCH 27, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Objection to instructions, directions or conduct of the trial judge to the jury must be promptly made by noting exception thereto in order that the same may be subject to review on appeal.

OPINION OF THE COURT BY GALBRAITH, J.

This is an action for damages resulting to the plaintiff from the alleged carelessness of an agent and employee of the defendant. The jury returned a verdict for the defendant. The plaintiff comes to this court on exceptions, (1) to the overruling of the motion for a new trial; (2) that the trial court coerced the jury into finding a verdict.

The exception to the verdict of the jury, properly embodied in the motion for a new trial, "that the verdict was contrary to the law and the evidence and the weight of the evidence," was not well taken. The plaintiff and two others testified in his behalf and if their evidence was accepted as true by the jury the defendant was liable and the verdict should have been for the plaintiff. On the other hand five witnesses testified for the defendant, and if they were believed by the jury the defendant was in no way at fault and was not liable. So a verdict for either party would have found support in the evidence.

The alleged acts of coercion consisted of keeping the jury out after they had reported that they could not agree, and certain

charges and statements made by the judge to the jury at the several times they reported to the court. No exceptions were taken by counsel to any of these charges or statements at the time they were made. Counsel was present and assenting to each of them and did not discover that they amounted to "legal coercion" until after the verdict was returned against his client. If the conduct of the judge was objectionable, counsel should have noted exceptions at the time. *Gillespie v. McBryde*, 13 Haw. 433. The counsel for the plaintiff not only acquiesced in the acts and instructions alleged to constitute "legal coercion," by his silence, but positively refused to consent to the discharge of the jury at noon on the day after the cause was given to it and after most of the acts here complained of had taken place. He is now in no position to allege as error matters to which he gave his approval in the presence of the court and jury. As was said in *Lihue Pl. Co. v. Kepalai*, 13 Haw. 316, "Counsel on the contrary, saw fit to speculate on the chances of a favorable verdict. Having done so the plaintiff must abide by the consequences; by his conduct he has waived such right as he otherwise might have had to the relief now sought."

The exceptions are overruled.

Geo. A. Davis for plaintiff.

J. T. De Bolt for defendant.

JOHN KIDWELL *v.* FRANK GODFREY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 4, 1902.

DECIDED MARCH 29, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If the purpose of a trust is to keep and preserve the estate for a time subject to such directions as the grantor may give, one of which directions may be to convey to another, such trust is not within

the operation of the Statute of Uses, assuming such statute to be in force in this Territory. A duty is imposed on the trustee to convey, if requested, and to otherwise do as directed, and the full performance of the duty makes it necessary that the legal title should be in him.

In such a case, equity has jurisdiction to compel the trustee to convey the legal title to the *cestui que trust* upon request and to enjoin an action at law to quiet title instituted under the statute by the respondent against the complainant prior to the filing of the bill.

OPINION OF THE COURT BY PERRY, J.

Bill in equity with prayer that an action at law be restrained, that respondent be declared a trustee for the complainant of certain land and that he be ordered to execute and deliver a deed conveying his legal title to said land to the complainant. The facts, as alleged, are as follows: The land of Wailele, situate at Manoa, Oahu, was demised by its former owner, Theophilus Metcalf, to his son Frank for life and upon his death to his lawfully begotten children. Frank Metcalf died on March 9, 1900, leaving surviving him his lawfully begotten children, Emma and Thomas. On October 3, 1895, Emma executed a deed conveying her interest in said land to Paul Neumann in trust to "keep and preserve for the benefit of said grantor subject to such further instructions which the grantor may give to said trustee in writing duly acknowledged." On March 8, 1899, Emma quitclaimed all her right, title and interest in Wailele to complainant for the consideration of \$400.00, but no conveyance was obtained by Kidwell from the trustee. Subsequently Thomas Metcalf by a deed executed during his minority and also by a confirmatory deed executed after he attained his majority, conveyed to complainant all his right, title and interest in the land. Paul Neumann died on or about July 2, 1901, and one Alice Metcalf was thereafter, by decree of court, made his successor in the trust created by the deed. On January 9, 1902, a deed was executed by Alice Metcalf as such trustee, purporting to act under the authority and direction of Emma expressed in writing duly acknowledged, and by Alice as attorney-in-fact for Emma, conveying to the respondent "all my right, title and

interest, consisting of an undivided one-half," in the land of Waialele. Godfrey then instituted at law an action to quiet title, against Kidwell, alleging substantially the foregoing facts and claiming to be entitled to an undivided one-half of the land in fee simple. Respondent demurred to the bill on the ground that it does not state facts sufficient to constitute a cause of action and the Circuit Judge sustained the demurrer and dismissed the bill on the ground that the complainant has a plain, speedy and adequate remedy at law. From that ruling this appeal is taken.

Respondent's contention is, (a) that the trust created by the deed was a dry trust, that by the operation of the Statute of Uses the legal title became at once vested in Emma and that therefore Kidwell may defend the action at law by showing that the legal title is in himself; (b) that Kidwell may set up an equitable estoppel as a defense to the action; and (c) that Kidwell may prove his equitable title in the action.

Whether or not the Statute of Uses is in force in this Territory we need not say. The trust in question is not one within the operation of the statute. The object of the trust was to keep and preserve the estate for a time subject to such directions as the grantor might give, one of which directions might be to convey to another. A duty was imposed upon the trustee to convey, if requested, and to otherwise do as directed, and the full performance of the duty made it necessary that the legal title should be in him. "To the application of the statute in England and elsewhere, there are certain well-defined exceptions, or rather rules of construction, which limit the effect of the statute. One rule relates to special or active trusts which were never within the purview of the statute. Therefore, if any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, in all these and in other like cases, the operation of the statute is excluded, and the trusts or uses remain mere

equitable estates. Perry on Trusts, p. 305."—*Estate of Boardman*, 5 Haw. 147. See also Perry on Trusts, § 305; Lewis on Trusts, p. 210; *Morton v. Barrett*, 22 Me. 263; *Norton v. Leonard*, 12 Pick. 156; *Meucham v. Steele*, 93 Ill. 137, 145; *Hutchins v. Heywood*, 50 N. H. 497; and *Reed v. Power*, 12 R. I. 16.

That on the facts alleged an equitable estoppel against Godfrey could be successfully claimed, is at least not clear. Assuming, however, that Godfrey could be held estopped from setting up at law title to the land, such defense would not furnish a remedy full and complete as that which complainant may obtain in equity. The estoppel would not pass the legal title. Tiedemann, Real Property, §§ 729, 730. In equity the respondent can be decreed to convey such title to the complainant and thus remove all cloud from the latter's title. So, also, of the third contention. Even if the defendant may establish his equitable title in the action at law, still it will be open to him to apply to equity for a decree requiring Godfrey to convey to him the legal title. He may so apply now as well as after a verdict at law, and if he does so now, equity may determine the whole matter and restrain the action at law. We think that under the circumstances Equity has jurisdiction. See 16 Am. & Eng. Enc. of Law, 2nd ed., 367.

The decree appealed from is reversed and the cause remanded for such further proceedings as may be proper.

Robertson & Wilder for complainant.

Fitch & Thompson for the respondent.

MARY SYLVA KEANU *v.* KAOHI, KAHOOHANOHANO, NUU, and KALUNA.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED MARCH 12, 1902.

DECIDED MARCH 29, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A devise of "all that piece and parcel of land" carries the fee.

An expression that the devise "is to be her dower without any personal property but this is much more than if she took her dower of all my estate" does not show an intention that the devise was to be for life only.

OPINION OF THE COURT BY FREAR, C.J.

Ejectment for apanas 1 and 2, L. C. A. 2,572. Trial by the court, jury waived, on agreed facts. Judgment for plaintiff. Exceptions by defendants.

The only question presented for our determination is whether under the will of one Manuel Sylva, admitted to probate in 1874, his widow, Ohina, took a fee simple or only a life estate. The plaintiff, daughter of the testator, claims on the theory that the widow, now dead, took only a life estate. The defendants claim under the widow by descent on the theory that she took a fee simple.

The devise in question reads as follows: "I will and bequeath to my wife Ohina all that piece and parcel of land situate in Waiehu by name Pahapahawale containing 3 acres and 46-100 it being the wish of my wife Ohina that I should do so and that is to be her dower without any personal property but this is much more than if she took her dower of all my estate."

It seems to be taken for granted, and we are of the opinion, that if this clause of the will had ended with the description of

the property, it would have carried the fee. True, it has not been decided in this jurisdiction, so far as we are aware, that a devise merely of a "piece and parcel of land" would carry the fee in the absence of the word "heirs" or other words indicating an intention to devise the fee, although it has been held that the word "property" or the word "estate" in a will is sufficient to carry the fee. *Hemen v. Kamakaia*, 10 Haw. 547; *Brown v. Brown*, 11 Haw. 47; *Robinson v. Aheong*, 13 Haw. 196. But it has been held that a conveyance of a "piece of land" may carry the fee without the use of the word "heirs," and the reasoning by which that conclusion was reached would apply with greater force in the case of a devise. *Branca v. Makui-kane*, 13 Haw. 499.

It is contended, however, and the trial judge held, that the words relating to dower indicate an intention that the estate should be for life only, as dower in real estate is for life only. The devise, however, was not made as dower, for dower cannot be created or assigned by will. It was in lieu of dower and might as well have been in fee simple as for life. It was also in place of one-third of the personal estate absolutely as well as in place of one-third of the real estate for life. It was also understood to be "much more than if she took her dower."

The exceptions are sustained, the judgment of the Circuit Court is reversed and the case is remanded to that court for further proceedings consistent with these views.

J. M. Kaneakua for plaintiff.

W. A. Whiting and *Geo. Hons* for defendants.

JOHN J. GRACE and FRANK L. IRWIN, Copartners, v.
CARL S. SMITH, ADMINISTRATOR OF THE ES-
TATE OF ITO, Deceased.

ORIGINAL.

SUBMITTED MARCH 17, 1902.

DECIDED APRIL 3, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Expenses of the last illness of a decedent are not entitled to priority
of payment over ordinary debts.

OPINION OF THE COURT BY FREAR, C.J.

The only question for determination on this submission on agreed facts is whether the plaintiffs, physicians and surgeons, are entitled to priority of payment for professional services rendered the decedent during his last illness, that is, priority over ordinary creditors.

We have no statute on the subject. In the absence of statute, the expenses of the last illness have no priority. 2 Woerner, Administration, Secs. 361, 364, 365; 8 Am. & Eng. Enc. of Law, 2nd Ed. 1037. In most of the states such expenses by statute rank next after the expenses of administration, funeral expenses, and debts to the United States, and before ordinary debts. This seems to be just, but it is for the legislature, not the courts, to so provide. Under the law we must hold that the plaintiffs' claim should be paid *pro rata* with other ordinary claims, the estate of the decedent being insufficient to pay them all in full.

Judgment accordingly.

Plaintiffs in person.

Defendant in person.

WILLIAM W. HARRIS v. HENRY E. COOPER, Secretary
of the Territory of Hawaii.

ORIGINAL.

SUBMITTED APRIL 4, 1902.

DECIDED APRIL 5, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under the provisions of the election law that candidates shall be nominated by writing signed by not less than twenty-five qualified electors of the district and deposited together with twenty-five dollars with the Secretary of the Territory not less than a prescribed time before the election, and that the ballots shall contain the names of all candidates so nominated and no other name, the Secretary cannot lawfully inquire into and pass upon the qualifications of a candidate or decline to place his name upon the ballots if he is duly nominated, even though he, the Secretary, may believe him to be disqualified, nor can the courts compel him to do so,—although the Secretary may inquire into and pass upon the question of due nomination and omit from the ballots the name of a candidate if the law prescribing the requirements of a due nomination has not been complied with and may be compelled by the courts to perform his duty in that respect.

OPINION OF THE COURT BY FREAR, C.J.

This is a submission on agreed facts under Civil Laws, Section 1255, as amended by the Laws of 1898, Act. 18. The practical question for our determination is whether under the election law the Secretary of the Territory, who has charge of the printing of ballots, should omit therefrom the name of a candidate for representative who though duly nominated is not eligible. More broadly stated, the question is whether the Secretary can go behind the question of due nomination and inquire into

and pass upon the question of the qualifications of the candidate.

The facts agreed on are in substance as follows: A special election was called for April 9, 1902, to fill a vacancy caused by the death of a member of the house of representatives. The plaintiff was duly nominated and is qualified to be a representative. One August Dreier also was duly nominated but is not qualified to be elected. On April 1, 1902, the plaintiff filed a protest with the Secretary against placing Mr. Dreier's name upon the ballot. On the next day the Secretary overruled the protest and notified the plaintiff of his, the Secretary's, determination to place Mr. Dreier's name upon the ballots. The Secretary is now causing the ballots to be prepared and printed with Mr. Dreier's as well as the plaintiff's name upon them. The Secretary's sole reason for overruling the plaintiff's protest and determining to place Mr. Dreier's name on the ballots is his belief that he is without authority to inquire into and pass upon the qualifications of a duly nominated candidate.

The ground stated for Mr. Dreier's disqualification is his failure to meet the requirement of Section 40 of the Organic Act, "that in order to be eligible to be a member of the house of representatives a person shall, at the time of election," besides possessing other enumerated qualifications, "be qualified to vote for representatives in the district from which he is elected." The reason why he is not qualified to vote for representatives in that district is not stated, though we understand it to be that he is not a registered voter in that district as required, among other qualifications, by Section 60 of the same Act, "in order to be qualified to vote for representatives."

The fact being undisputed for the purposes of this case that Mr. Dreier is not eligible to be a representative, the sole question is whether the Secretary should omit his name from the official ballot, or rather whether this court should compel him to do so. The statutory provisions involved are Sections 56 and 89 of the election rules, Civil Laws, pp. 804, 815, as amended by Section 64 of the Organic Act. These read as follows:

"§ 56. No person shall be permitted to stand as a candidate

for election to the legislature unless he shall be nominated and so requested in writing, signed by not less than twenty-five duly qualified electors of the District in which an election is ordered, and in which he is requested to be a candidate. Such nomination shall, except as hereinafter provided, be deposited with the Secretary of the Territory not less than thirty days before the day of a general election or twenty days prior to a special election, except on the Island of Oahu, where such nomination shall be deposited not less than ten days before the day of any election.

"Each nomination shall be accompanied by a deposit of twenty-five dollars, on account of the expenses attending the election, which amount shall be paid into the Treasury as a Government realization.

"Upon receipt at the office of the Secretary of the Territory of a nomination of a candidate, the day, hour, and minute when it was received shall be endorsed thereon.

"Provided, however, that in case of the withdrawal or death of a candidate, a new nomination or nominations to replace the name of the person who has died or withdrawn, may be made, irrespective of such limit of time, with the Inspectors of Election of the Districts in which death or withdrawal has taken place, and the fee herein required deposited with them.

"In such case a voter, while voting, may write the name of any such new candidate upon the ballot, and vote for it as herein provided."

"§ 89. The ballots used in any Representative election district for the election of Representatives, shall be of uniform size, weight, shape, thickness, and of the same sizing color.

"Except as provided in Section 56 hereof, the ballots for each Representative election district shall contain the names of all candidates for Representatives for such district who have been duly nominated in manner herein provided, and shall contain no other name."

The last part of Section 89 is clear. On the one hand the ballot *shall contain* the names of *all candidates* who have been *duly nominated in manner herein provided*, that is, duly nominated under Section 56. On the other hand it shall not contain the name of any person not duly nominated. In other words the Secretary not only may but should decline to place upon the ballots the name of any candidate if his nomination is not signed

by at least twenty-five persons, or if among the signers there are not at least twenty-five qualified electors of the district, or if it is not filed with the Secretary within the prescribed time, or if it is not accompanied by a deposit of twenty-five dollars, etc. The first part of Section 56 is to the same effect, that "no person shall be permitted to stand as a candidate for election to the legislature unless," etc. The duty of the Secretary in these respects is clearly prescribed by the statute. This duty also is ministerial and the courts may enforce its performance. But the Secretary is not authorized to omit the name of a candidate who has been duly nominated, much less is there a duty on his part to do so even though he believes the candidate to be ineligible, and the court cannot compel him to do what it is not his duty to do.

Counsel for the plaintiff suggest many evils as possible, or as likely to occur, if the names of persons who are ineligible are allowed to be placed upon the ballots and counsel for the nominators of Mr. Dreier suggest other evils if the many delicate and difficult questions that might arise as to the eligibility of a candidate were to be determined by a single executive officer. Such evils are largely imaginary. Practically few of them would be likely to occur at all and they but seldom and there are other remedies provided than through the Secretary or the court. If the electors should vote for an ineligible candidate and if he should receive the largest number of votes and if a certificate of election should be issued to him, the house of which he might claim to be a member could so ascertain and declare him not elected.

The very fact that "each house shall be the judge of the elections, returns, and qualifications of its members" (Organic Act, Sec. 15) is sufficient reason why neither the Secretary nor the courts should undertake to pass upon the question of the eligibility of a candidate except when it is clearly their duty to do so. The jurisdiction of each house of the legislature is exclusive in such cases. Each branch of the government must respect the prerogatives of each of the others. The action of the courts in requiring executive officers to perform ministerial duties under

the election law is not a usurpation of jurisdiction vested exclusively in the respective houses of the legislature, but on the contrary is often an aid to that jurisdiction by compelling the performance of acts necessary to enable the house to act. The question of the eligibility of a candidate is different. It may be, though as to this we express no opinion, that even that question would have to be passed upon by the courts in some cases incidentally and even that it would be the duty of each house to apply the law as so construed by the courts, though not compellable to do so. Each branch of the government has certain powers and duties which the other branches cannot control. Each branch may abuse its powers but that possibility is not a ground for the usurpation of its powers by another branch. It is to be presumed that each branch will act according to law.

As already stated it is agreed for the purposes of this case that Mr. Dreier is ineligible to membership in the house of representatives, and since the statute does not in terms authorize the Secretary to pass upon the question of eligibility, the only ground that can be urged in support of the view that he should omit the name from the ballots or that the court should compel him to omit it, is the supposed absurdity of placing on the ballots the name of a person who cannot be elected to or hold a seat in the house, and that therefore the Secretary is on general principles or by implication given the power to pass upon the question of eligibility and to omit the name of an ineligible person, or at least that the court may prevent the perpetration of an absurdity. The answer to this is that the duties of the Secretary are prescribed by the statute and the court is not a panacea for all wrongs or evils. The courts act within certain defined limits. The matter in question is without those limits both because the court cannot compel the performance of what is not a duty under the statute and because the matter in question is within the proper sphere of another branch of the government.

The same argument, if sound, would apply to some extent, if not with equal force, to the powers or duties of other officers who may be called upon to act at other stages under the election

law. For instance, could the Inspectors of Election in any precinct rightfully take it upon themselves to decline to count the votes cast for a candidate whom they believed to be ineligible or to send the number of votes cast for such candidate to the High Sheriff or Sheriff, or could the latter decline to issue a certificate of election to a candidate who has received the largest number of votes because he believed him ineligible? Or could the courts step in at each stage and compel such action on the ground that the candidate is ineligible? Perhaps the most instructive case that has come to our notice in this connection is that of *People v. Board of Canvassers*, 129 N. Y. 360. In that case a candidate for senator was ineligible but had received the greatest number of votes. The State Board of Canvassers declined to issue a certificate of election to him. He applied to the court for a writ of mandamus to compel them to do so. The Court, consisting of seven judges, was unanimously of the opinion that the duty of the Board so far as it went was ministerial and enforceable by the courts, but that it could not go behind the returns and inquire into the eligibility of the candidate. The question then arose whether the court should compel the Board to issue a certificate of election to one who was clearly ineligible. The question was the converse of what it is in the present case. It was what the question would be here if the Secretary had declined to place Mr. Dreier's name on the ballots and Mr. Dreier had brought proceedings to compel him to place the name on the ballots. The majority of the court, five judges, applying to that case the general principle that mandamus should not issue to accomplish a wrong or the violation of a constitutional provision or except to secure or protect a clear legal right, went into the question of eligibility as a necessary preliminary question to be determined as a basis for determining the other question and, having found that the candidate was ineligible, declined to allow the writ to compel the Board to issue a certificate of election. Of course, the candidate could without the certificate go before the senate and there establish his right, if he had a right, to a seat. The minority, two judges, were of the opinion that, in view of the constitutional provision making each house the judge of the elec-

tions, returns, and qualifications of its own members, the court should not go into the question of eligibility at all but should compel the Board to issue the certificate of election, notwithstanding the general rule that mandamus should not issue except to protect a clear right. In other words according to the reasoning of the majority in that case the court should not compel the Secretary to omit Mr. Dreier's name and should not compel him to place it on the ballots, although it was his ministerial duty to do so. According to the reasoning of the minority in that case, the court should not only not compel the Secretary to omit the name but should, if he did omit it, compel him to place it upon the ballot.

The cases cited in behalf of the plaintiff, *State v. Leseuer*, 103 Mo. 253; *State v. Allen*, 62 N. W. (Neb.) 35; *State v. Falley*, 76 N. W. (N. D.) 996, are not inconsistent with the foregoing views. On the contrary they seem rather to support them. They go to show that the officer to whom is committed the preparation of the ballots may look into the question of whether the nomination has been made as required by the statute but they also tend to show by implication at least that he cannot go further and inquire into the question of the eligibility of the candidate. Other instructive cases are *State v. Van Camp*, 54 N. W. (Neb.) 113; *Lucas v. Ringsrud*, 53 N. W. (S. D.) 426; *Atkeson v. Lay*, 115 Mo. 538; *Price v. Lush*, 9 L. R. A. (Mont.) 467; *State v. Board of Canvassers*, 31 Pac. (Mont.) 536; *O'Ferrall v. Colby*, 2 Minn. 180; *Gulick v. New*, 14 Ind. 93; *Maynard v. Board of Canvassers*, 84 Mich. 228, 245; *Bingham v. Jewett*, 66 N. H. 382.

In our opinion the Secretary has acted according to law so far as appears in this case and the plaintiff is not entitled to have the name of Mr. Dreier omitted from the official ballot.

Judgment accordingly.

Robertson & Wilder and *T. McCants Stewart* for the plaintiff.

The Secretary in person.

Kinney, Ballou & McClunahan for the nominators of August Dreier.

LIBANA DE NOBREGA v. SYLVANO DE NOBREGA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 3, 1902.

DECIDED APRIL 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

What are *dicta* and what weight should be given to them, discussed.

Under our divorce statute alimony in gross may be awarded.

The granting of alimony is ancillary to the granting of the divorce and great particularity is not required in the prayer for alimony.

In estimating the amount of alimony in gross it is not necessary to use tables of mortality and annuities.

In this case the amount of alimony allowed by the Circuit Court is held to be clearly excessive and the time within which it should be paid too short.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

The Circuit Court upon granting the divorce in this case awarded to the wife as or in lieu of permanent alimony one-half of the husband's real estate in this Territory, but this Court on exceptions (13 Haw. 654) held that under the statute the Court could not order a division of the husband's real estate. The Circuit Court then ordered the husband to pay to the wife within fifteen days \$10,000 as alimony in gross. The libellee now brings the case here again on exceptions.

The main contention is that the statute does not permit alimony in gross, and the first question is whether that point is settled by the former decision referred to above. In that decision the majority of the Court, then differently constituted, held (1) that alimony could be granted in gross, but (2) that the hus-

band's real estate could not be divided. The minority concurred as to the latter proposition but declined to express an opinion as to the former on the ground that no opinion was called for on that question in view of the conclusion reached on the other question. It is now contended that the opinion expressed by the majority on the first question was mere *obiter dictum*. Just what are *dicta* and what weight should be given to them have been subjects of some difference of opinion. "According to the more rigid rule, any expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*." Bouv. Dic., Tit. Dictum. If both questions had been decided in the negative, the opinion on each would have disposed of the case as effectually as the decision on the other and the opinion on each would have been a decision as distinguished from a *dictum*. *Est. of Banning*, 9 Haw. 253; *Hawes v. Contra Costa Co.*, 5 Sawy. 287, (11 Fed. Cas., No. 6, 235). But the first question was decided in the affirmative and only the second in the negative, and consequently the case was disposed of on the second question only, and the opinion on the first was only a *dictum* according to the more rigid rule above set forth.

But perhaps as important a question as that of whether an opinion is a decision or a *dictum* is that of the weight to be given to it if it is a *dictum*. To hold that an opinion is a *dictum* is not equivalent to holding either that the court in the particular case acted unwisely in giving it or that no respect should be shown it. There are all shades. Even an actual decision may be reversed if clearly erroneous. An opinion expressed after full argument and due consideration upon a doubtful point closely connected with, or apparently though not necessarily involved in a case, should perhaps, on principle, be given greater weight than an actual decision rendered upon little argument and consideration. It should at least be given greater weight than an opinion expressed merely by the way. See cases *supra*. There is no doubt a greater tendency now than there was formerly to pass upon questions presented but not necessary to be decided, and doubtless

courts often go too far in that direction. Just how far they should go in any particular case depends largely upon the circumstances of that case. Whether in this instance the court should not have expressed an opinion at the former hearing upon the question now raised, we need not say. There is much that can be said on both sides. Perhaps the strongest reason that can be urged in support of the course pursued is, that the case was to go back to the Circuit Court for further action and that that court would naturally want instructions upon the point in question and that, if such instructions were not given, the case would probably be brought to this court again for the settlement of the question. Under such circumstances, with a view to settling the law of the case once for all, the court would often be justified in going further than it would under some other circumstances. A somewhat similar case was that of *Buchner v. Chicago, M. & N. W. R'y. Co.*, 60 Wis. 264. There, as here, two questions had been presented and the court had decided the first against and the second for the defendant. It was afterwards contended, as it is now contended here, "that it was mere *obiter* to determine the first proposition, by reason of the conclusion reached upon the second proposition." The court considered that a case of "*judicial dictum*" as distinguished from mere "*obiter dictum*," and said among other things: "To confine this court to the consideration of a single proposition, where several are involved and fully discussed by counsel, might at times operate to prolong litigation, increase the number of appeals, and inflict unnecessary burdens upon both parties and the public, and yet at times it may be highly proper. * * * We do not hold that the finding of the court in the other case * * * is *res adjudicata* in this case; nor that all that was said in that case is absolutely binding upon the parties and the court in this case; but simply that that opinion cannot fairly be treated as merely *obiter*." This reason for taking the course pursued, namely, to avoid further litigation, would not operate so strongly where, as at the former hearing in this instance, the court was not unanimous and was not composed of its regular members, a Circuit Judge sitting in place

of an absent member. Under such circumstances it would be doubtful whether counsel would be satisfied with the opinion and whether they would not feel justified in bringing the disputed question to the court as differently constituted. Such turned out to be the case.

The question was argued by counsel, including the one who now contends that the opinion upon it was mere *obiter*, was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended. Under such circumstances the opinion should be given considerable weight, and should not be disturbed if, upon consideration of the merits, the question is found to be one upon which there might well be a difference of opinion and the opinion is found to be not contrary to good policy. Such we find is the case.

As to the question of policy, the fact that alimony in gross is now expressly permitted by statute in many of the states and even in England where the contrary view originated and was adhered to in the courts, some statutes even going so far as to permit a division of the estate *in specie*; the fact that doubtful statutes elsewhere have in a number of cases been so construed; and the fact that this view has often been favorably commented upon and seldom condemned, all go to indicate that there is nothing contrary to public policy to permit alimony in gross. This means, not that an award in gross should usually be made, but merely that there is no sound objection to the existence of the power to award alimony in gross or to the exercise of such power in proper cases. Some courts which hold that such power exists hold also that it should not be exercised except under special circumstances. As a rule the alimony should be payable periodically. The court can then control its amount more effectually and change it from time to time according as the means and needs of the parties change. An award in gross may be made appropriately when the husband is likely to vexatiously delay or

withhold payments, and of course, there are other circumstances to be considered.

As to the law, it will not be necessary to repeat the statute or review at length the authorities cited in the former opinion referred to. Under statutes very similar to ours, it has been held, as pointed out in the former opinion, in California, Illinois and South Dakota, that alimony may be awarded in gross. The Massachusetts cases also are relied on as holding the same way. But it is said that they are distinguishable by reason of the statute being differently worded. That statute contains the words: "*such part of the personal estate* of the husband and such alimony out of his estate," while our statute contains no such words as those we have put in italics. But, as we understand it, alimony is not granted in gross in Massachusetts under the words italicised, for those words permit a division of the estate *in specie*, but the authority relied on there is the other portion of the statute which reads, "alimony out of his estate," which permits an award merely of money, whether payable out of income or estate, and here lies an important distinction. Power to award alimony in gross does not, any more than power to award it as an annuity, permit a division of even personal estate *in specie*. Alimony, whether in gross or periodical, is payable out of income or estate, real or personal, but is not a part of the estate. This distinction is brought out more clearly in the Wisconsin cases under a similar statute. *Bacon v. Bacon*, 43 Wis. 197; *Campbell v. Campbell*, 37 *Id.* 206.

Several words and phrases in the statute are relied on as tending to show an intention on the part of the legislature that alimony should be periodical only. For instance, the allowance is for the wife's "support." The husband may be required to give "reasonable security." Upon his neglect to give such security or make payment, the court may "sequester his personal estate and the rents and profits of his real estate," and cause the same to be applied to the allowance as to the court shall seem just "from time to time." Civ. L., Secs. 1943, 1947. Reliance is placed also upon the general principle that the statute should be

construed with reference to the old rules that obtained in the absence of statute, as, for instance, that alimony was always a periodical allowance. It must be conceded that all these arguments have considerable force, and yet they are not conclusive. Alimony in gross as well as in periodical payments may be for the wife's support. The husband may be required to give security for one kind as well as for the other kind, as time is often allowed for the payment of alimony in gross, and sometimes it is made payable in installments extending over a period of several years, and, besides, this part of the statute, if it were not applicable to alimony in gross, could be applied as far as applicable, that is, to periodical alimony, if applicable to that only. The personal estate and the rents and profits of the real estate could be sequestered as well for alimony in gross as for periodical alimony; and upon this point the distinction above referred to should be borne in mind—that alimony in gross is not a part of the estate either real or personal though payable out of the estate or income. The court may also cause the personal estate and rents and profits of the real estate to be applied to the allowance "from time to time" in one case as well as in the other, so long as payment has not been made, or may exercise the power conferred by the statute so far as it is applicable. We may add that some or all of the words now relied on are found in the statutes of all the states above referred to and yet they were not considered sufficient to show an intention that no alimony in gross should be awarded. The statute, it is true, should always be construed to some extent in the light of the common and ecclesiastical law, and yet this argument loses some of its force from the fact that so great departures have been made from such law in the very statute now in question. For instance, "allowance" and not "alimony" is the word used in the statute. It is authorized in cases of absolute divorce as well as in cases of separation, and in favor of the children as well as in favor of the wife, all contrary to the old practice.

No doubt the general impression here, as shown by the practice, has been that alimony in gross, if not absolutely unauthor-

ized, should at least not usually be granted. Such alimony however has been granted in several cases which have come to this court on exceptions but in which the court was not required to express an opinion upon the point.

On the whole we do not think sufficient cause has been shown for reversing the opinion expressed at the former hearing.

It is contended further that no alimony could be granted for want of a sufficient prayer in the complaint. The prayer of the amended complaint, so far as it bears on this question, was, "That the court order an equitable division of said property between plaintiff and defendant; that she have alimony during such time and in such amount as the court may decree and that defendant be ordered to pay the costs of this action and reasonable counsel fees; and that plaintiff have such other and further relief as to your honor may seem just and proper in the premises." The granting of an allowance is, under the statute, ancillary to the granting of the divorce, and while the prayer could easily be improved so far as permanent allowance or alimony in gross is concerned, it was sufficient.

A further contention is that there was not sufficient evidence to support a decree for alimony, in that it was not shown how much was necessary for the wife's "support" per month or year, &c., or what her expectation of life was. In the nature of things it could not, nor does the statute require it to be shown exactly how much she would need, nor in awarding an allowance in gross was it necessary to estimate the amount by tables of annuities and mortality. The statute provides as to the amount, that it shall be such "as the court shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." Civ. L., Sec. 1943. Courts elsewhere do not seem as a rule to make use of such tables or to require exact proof of the wife's needs in estimating alimony in gross.

Lastly it is urged that the amount is excessive. The amount is largely within the discretion of the trial court, but that discretion can be reviewed as in other cases of discretion, when it is

abused, that is, in cases of this kind, when the amount is clearly excessive. All the circumstances should be considered. There was much difference of opinion among the witnesses as to the value of the defendant's property, which consisted chiefly of real estate. The court placed it at \$30,000, basing the estimate principally upon the testimony of one witness, and making no allowance for the fact that that witness estimated the value of the largest tract of land as a whole, irrespective of the fact that the defendant had only a part interest in it and that the title to another tract was defective or at least doubtful. Probably \$20,000 would be as large an estimate as could reasonably be sustained on the testimony. The wife owned real estate valued at \$3,500 at the lowest, the larger part of which had been given to her by her husband about two years before the action was brought. It did not appear what her needs were, but about a year and a half before the action was brought the parties agreed in writing to live separately, he to pay her \$6 a week. She had also some income from her own land. She had contributed some to the earnings of the family before the separation, at times hiring out and at other times assisting in the work of the dairy which he conducted. There were no minor children, the only child being a son twenty-four years old. The divorce was sought and granted solely for adultery during the period of separation. There were no special circumstances of aggravation, the facts, while condemnable enough, as they are in all such cases, being only such as might be expected in any such case. The usual practice is to award not over one third of the husband's income. If he had died she would be entitled by way of dower to only one third of the income of his real estate for her life, besides one third of his personal estate, which in this case amounts to little. But if an allowance in gross is made, she gets it absolutely and not merely for her life. As a rule allowances in gross are less than one-third of the estate, and in estimating the amount the property that the wife already has is taken into account and especially that part of it which came from her husband, and, on the other hand, any contributions she may have made. On the

whole, in our opinion, considering the amount that she already has, the allowance should not exceed \$5,000.

We are also of the opinion that the time allowed for payment is too short. The whole \$10,000 was ordered paid within fifteen days. The property was not readily salable—by reason of its character and location. Its value was very uncertain. The title to some of it seems to be uncertain. It is doubtful whether \$10,000 could be obtained by mortgage, and, if the property had to be sold in order to realize the amount required, it would probably be at a great sacrifice, with the result that while the wife would get only what was ordered the husband would lose a great deal more. In *Furley v. Furley*, 30 Ia. 353, the property was valued at \$4,000 and the allowance was \$1,300, which was ordered paid, \$500 in sixty days, \$400 in six months and \$400 in nine months. On appeal the court held that the amount was not excessive but that the time for payment was too short. The time was changed so that \$300 was payable in ninety days, \$500 in nine months, and \$500 in eighteen months. The time need not be so long now that the amount is reduced to \$5,000 as it should be if it were to remain at \$10,000, but it seems to us that at least six months should be given in which to pay the greater part of it, and the defendant may be required to pay interest on it meanwhile.

The exception is sustained, the order excepted to set aside and the case remanded to the Circuit Court for further proceedings consistent with the foregoing views.

Geo. A. Davis for libellant.

J. T. DeBolt for libellee.

OPINION OF GALBRAITH, J.

Without assenting to all of the arguments advanced in the foregoing opinion I concur in the conclusion and judgment announced.

DISSENTING OPINION OF PERRY, J.

For the reasons stated in the opinion heretofore filed by me in this case (13 Haw. 663), I am still of the opinion that the views expressed by the majority at the former hearing on the question of whether or not our statute permits an award of a sum of money in gross as alimony are *obiter dicta* as distinguished from actual decision. The foregoing opinion of the majority contains much in support of this view. What the precise distinction, if any, is between judicial *dictum* and *obiter dictum* or what shades or degrees of *dicta* or decisions there are, I deem it immaterial to consider, for I concede to the *dicta* in this case all the weight and respect to which they are entitled as such. They have not the force, however, of an actual decision. Conceding to the *dicta* the weight and respect due them, I am unable to reach the conclusion expressed by the majority at the former hearing on the main question now before the Court and therefore respectfully dissent. Nor do the circumstances of the case seem to me to be such as to render obligatory the adoption of the former opinion of the majority merely because the statute under consideration may perhaps be regarded as one upon the construction of which there may be a difference of opinion.

The authorities are uniform to the effect that in the absence of statutory authorization and, perhaps, of the consent of the parties, the divorce court is without jurisdiction to decree the payment to the wife of a sum in gross. Alimony, within the strict meaning of that term, that is, an allowance to the wife, for her support, to be paid by the husband at stated intervals, is all that can under those circumstances be granted. No consent of the parties has been shown in this case. The power, then, to decree the payment of a sum in gross, if it exists at all, exists, as held by the majority of the Court, by virtue of the provisions of our statute. Section 1943 of the Civil Laws reads: "Upon granting a divorce for the adultery or other offense amounting thereto, of the husband, the Court may make such further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage, and to pro-

vide such suitable allowance for the wife, for her support, as the Court shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." It is true that the word "allowance" and not "alimony" is here used and that "allowance" is capable of a broader signification than "alimony." In my opinion, however, the allowance intended by the legislature was, as disclosed by the remaining language of that section and by that of section 1947, alimony within the correct definition of that term. In the first place, it was *for the wife's support* and not for any other purpose. This implies, of course, that it is to cease upon her death, or upon her remarriage, if she remarries. An award in gross cannot be measured in accordance with or justified upon these principles. Section 1947 reads: "Whenever the Court shall make an order or decree requiring a husband to provide for the care, maintenance and education of his children, or for an allowance to his wife, the Court may require him to give reasonable security for such maintenance and allowance; and upon neglect or refusal to give such security, or upon default of him and his surety to provide such maintenance and allowance, the Court may sequester his personal estate, and the rents and profits of his real estate, and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied towards such maintenance and allowance, as to the Court shall from time to time seem just and reasonable." These provisions strongly indicate, it seems to me, that what the legislature had in mind was a periodical allowance. The provision authorizing the Court to require security has reference to a periodical allowance and not to an allowance in gross. Further, the property authorized to be sequestered, to-wit, the personal estate and the rents and profits of the real estate, is directed to be applied towards the allowance as to the Court shall *from time to time* seem just and reasonable. See, in this connection, *Calame v. Calame*, 25 N. J. Eq. 548.

In many of the States statutes have been enacted conferring in express terms the power now under consideration. Decisions of

the courts of those states upon the same or similar questions are obviously of no assistance in this case since they are based upon those statutes. The statute in Massachusetts, (General Statutes of 1860, Chap. 107) upon which the ruling in *Burrows v. Purple*, 107 Mass. 431, is based, differed from our statute in some essential particulars, as, for example, in providing (Section 43) that "the court may further decree" to the wife "*such part of the personal estate* of the husband and such alimony out of his estate as it deems just and reasonable," thus indicating clearly an intent to authorize an award of personal property, at least, in kind and by way of division and thereby aiding the inference that something more than strict alimony was intended. Again, section 44, "When a divorce is decreed for any of the causes mentioned in sections 7 and 10, the court granting it may decree alimony to the wife, *or any share of her estate in the nature of alimony to the husband*," and section 45, "The court may *enforce decrees made for allowance, alimony, or allowance in the nature of alimony* pending libels, or *upon or after final decrees* of divorce, in the same manner as decrees are enforced in equity." In view of these provisions, the decisions in the Massachusetts cases can not, it seems to me, be invoked in aid of the construction contended for by the libellant.

The statutes in Illinois, California and South Dakota are similar to ours and the decisions cited by the majority from the courts of those states are undoubtedly authorities in support of the conclusion reached by it. The reasoning employed in those decisions is, however, unsatisfactory to me and, with respect, I decline to follow them.

While there may have been others, but two cases in this jurisdiction have been called to my attention in which the trial court made an award in gross, and in each of those cases exceptions were noted and taken to the Supreme Court contesting the power to make the award. The cases, however, were disposed of on other issues.

To say that as a matter of public policy there is no sound objection to the existence of the power to award alimony in gross

or to the exercise of such power in proper cases, furnishes no assistance in the construction of the statute or in the determination of the question as to whether or not the power does exist.

In my opinion, the case should be remanded to the Circuit Court with instructions to decree a periodical allowance for the wife for her support, payable until further order of the Court.

IN THE MATTER OF THE ESTATE OF R. W. HOLT,
deceased.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 7, 1902.

DECIDED APRIL 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The absence of a transcript of the evidence is not sufficient ground for the dismissal of an appeal when the transcript is not necessary to a disposal of the case on its merits.

If a trustee has overpaid a beneficiary entitled to the income for life, he or his successor in the trust may recoup himself out of future income to which such beneficiary would otherwise be entitled.

OPINION OF THE COURT BY FREAR, C.J.

The appellees first moved to dismiss the appeal on the ground that no transcript of the evidence was on file. We held that that was not sufficient ground unless the evidence was necessary to enable the court to dispose of the appeal on its merits and that the absence of the evidence would merely deprive the appellant of its benefit in so far as he might be obliged to rely on it. The case was then heard on its merits and we are of the opinion that the evidence is not needed in this court under the circumstances.

The main question is whether, when one trustee has overpaid beneficiaries entitled to the income for life, a succeeding trustee may withhold from those beneficiaries an equal amount of the income to make good the corpus of the trust for the benefit of the remaindermen.

The last annual account of the former trustee had been approved, his resignation accepted, and Henry Smith, the present trustee, appointed, and the former trustee ordered to file a supplementary account to date, which he did, but that account had not been approved. The present trustee in his first annual account showed that he withheld from the income of the estate \$2,114.70 which he contended his predecessor in the trust had overpaid out of the corpus to the life beneficiaries, J. D. and J. R. Holt. These beneficiaries objected and the matter was referred to a master, who found that the amount in dispute had been paid to them by the former trustee in excess of the income actually received during the period covered by the supplementary account, though the amount was due and collectible at the time of the transfer to the new trustee, and that this came about because the beneficiaries needed income monthly while the rents and interest which made up the income of the trust were payable semi-annually, and also because there had been some delay in collecting the rent on a new lease owing to delay in the execution of the lease on account of the temporary absence of one of the lessors. No exceptions were taken to the master's findings of fact, but it was contended, and the Judge held, that as the former trustee had paid out of the estate what he was not authorized by law to pay, it must be regarded as a personal advance, that he could not reimburse himself out of subsequent income but that he stood in the position of any other creditor and that his successor in the trust could not act as a collector for him out of the trust funds and that he should pay over to the life beneficiaries the amount in dispute. The trustee appealed.

It seems to us that sufficient regard was not paid to the nature of a trust and the duties of trustees and those who acquiesce in or profit by a breach of the trust. The trustee was trustee for

the remaindermen as well as for the life beneficiaries. The latter received the whole benefit of the breach. The new trustee was not acting merely as a collector for his predecessor but for the benefit of the remaindermen. There can be no doubt that if there had been no change of trustees, the trustee could retain future income to the amount of the overpayments. In *Livesey v. Livesey*, 3 Russ. 287, an executrix who had prematurely paid an annuity to one beneficiary for two years out of what was payable to another beneficiary, was allowed to retain the amount out of future installments. "The effect of the order" was merely that the "sum, so paid, shall be considered in account with the executrix, and taken as a part-payment of the bequest as now ascertained." See also *Dibbs v. Goren*, 11 Beav. 483; *Cooper v. Pitcher*, 4 Hare 485; *Jacobs v. Rylance*, L. R. 17 Eq. Cas. 343; *Booth v. Booth*, 1 Beav. 126; *Greenwood v. Wakeford*, *Id.* 576; 2 Perry, Trusts, § 931; Lewin, Trusts, 8th ed., p. 356. We cannot see any satisfactory reason for holding differently where there has been a change of trustees. The duty of the trustee to the remaindermen is the same and the liability of the beneficiaries who received the benefit of the misapplication is the same. See *Greenwood v. Wakeford*, *supra*; *Woodyatt v. Gresley*, 8 Sim. 180.

The appeal is sustained, the order appealed from reversed and the case remitted to the Circuit Judge for further proceedings consistent with the foregoing opinion.

Fitch & Thompson for the cestuis que trust.

Holmes & Stanley for the trustee.

F. WUNDENBERG, TRUSTEE, v. GEORGE MARKHAM.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 11, 1902.

DECIDED APRIL 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Ordinarily a court of equity will not enjoin the commission of a trespass upon land, when the title has not been tried at law; but if the acts or threatened acts are such as to cause irreparable injury, an injunction, at least pending legal proceedings for the determination of the title, will be granted.

The facts stated in the bill held not to constitute a case of irreparable injury.

An injunction will not be used to take property out of the possession of one party and put it into that of another.

Where the injury apprehended from a trespass or threatened trespass is not serious nor in its nature irreparable, but the main object of the suit is to settle the title, a court of equity ought not to interfere by injunction, even if the respondent be insolvent.

OPINION OF THE COURT BY PERRY, J.

Appeal from a decree sustaining a demurrer and dismissing the bill on the ground that the complainant has a plain, speedy and adequate remedy at law. The bill avers that one J. H. Cummings has for several months last past been in possession of certain premises described and that such occupation was without right or claim of right on Cummings' part; that on November 21, 1901, complainant removed Cummings' goods and chattels from the premises and took exclusive possession of such premises; that thereafter, on the same day, respondent together with Cum-

minge, who acted as his servant, entered and took and held forcible possession of the premises and excluded complainant therefrom, though respondent has no right, title or interest in or to the land or right to the possession thereof; that the respondent's only claim is under a pretended deed, a suit for the cancellation of which has been instituted; that even if the deed is valid, respondent has no right of possession; that complainant has agreed to lease the premises to one Mendonca and put the latter in possession on November 21, 1901; that respondent has ejected Mendonca, that the latter demands of the complainant to be placed in quiet possession and in the meantime refuses to pay the rent agreed upon; that the buildings on the premises are in a dilapidated condition, that it is necessary to make immediate repairs in order to prevent a forfeiture of the lease under which complainant holds and that the lessor has threatened to enforce forfeiture for breach of the covenant to repair; and that respondent is a person without property and pecuniarily irresponsible and unable to respond in damages for the injury caused. The prayer is that respondent be enjoined from going upon the premises and from interfering with plaintiff therein.

The jurisdiction in equity is sought to be sustained on the grounds of irreparable injury and insolvency of the respondent. Ordinarily a court of equity will not enjoin the commission of a trespass upon land, when the title has not been tried at law; but if the acts or threatened acts of the respondent are such as to cause irreparable injury, an injunction at least pending legal proceedings for the determination of the title, will be granted because adequate redress cannot be had at law. *Ehrardt v. Boaro*, 113 U. S. 537; *Burr v. Trades Council*, 53 N. J. Eq. 101; 2 Story Eq. Jur., § 928. In our opinion, however, the facts stated in the bill do not make out a case of irreparable injury. Possession of the land, as also damages for its detention, can be recovered in an action of ejectment; and even if a forfeiture of the lease is enforced against the complainant and such forfeiture is caused by the wrongful acts or negligence of the respondent, the loss to the complainant is capable of ascertainment in terms of

money and judgment for the amount of such loss may be recovered at law. Moreover the complainant in this case not only has not tried his title at law but, upon his own showing, is and for several months last past has been out of possession. Respondent is in possession. Under these circumstances, equity will not interfere. "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another."—*Lacassagne v. Chapuis*, 144 U. S. 119, 124. See also *Spelling on Injunctions*, § 368.

As to the insolvency of the respondent. The authorities on this subject are not uniform. Many expressions are to be found in decisions to the effect that equity will enjoin the commission of a trespass where the trespasser is insolvent, this on the theory that a judgment at law will not under the circumstances furnish adequate redress. These expressions are generally *dicta*, found either in cases where the injunction was granted on some other ground, as, for example, of irreparable injury or to avoid a multiplicity of suits, or in cases where the injunction was refused. In some instances, however, they are actual decisions. On the other hand it has been held, and we think it to be the better rule, that the insolvency of the respondent is not of itself sufficient ground for an injunction to restrain an ordinary trespass, although in connection with other circumstances that fact may be given great weight in determining the exercise of the discretion of the court. "The irresponsibility of the party is doubtless one element to be weighed in these cases, but it is not decisive. * * * Where the injury apprehended is not serious nor in its nature irreparable, but the main object of a suit would be to settle the title, a court of equity, we think, ought not to interfere by injunction, even if the defendant be insolvent."—

Morgan v. Palmer, 48 N. H. 336. The main issue between the parties in the present case being as to the title, and the object of the suit being to transfer the possession and no irreparable injury being shown, we think that the mere fact of the respondent's insolvency is not sufficient to warrant interference by injunction.

The decree appealed from is affirmed.

J. A. Magoon & T. I. Dillon for complainant.

G. A. Davis for respondent.

IRENE II HOLLOWAY *v.* CHAS. A. BROWN.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 12, 1902.

DECIDED APRIL 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A writ of error may issue from this Court to a Circuit Judge sitting, in Probate, at Chambers.

A Circuit Judge, at Chambers, has no jurisdiction to revise or modify a decree of divorce rendered in the Circuit Court.

The consent of the parties cannot give the Judge or Court jurisdiction over the subject matter of a controversy.

OPINION OF THE COURT BY GALBRAITH, J.

The defendant in error filed a petition in the Probate Court of the First Circuit, at Chambers, alleging in part that on November 18th, 1898, Irene II Brown was appointed and qualified as the guardian of George II and Francis Hyde II Brown, the children of petitioner and said Irene II Brown, and that no provision was made for petitioner to visit said children; that Irene II Brown has since her appointment as guardian married one Carl Holloway; that the said guardian is contemplating a visit to Cal-

ifornia, and praying for an order appointing such time for the petitioner to see said children as the court shall deem proper and that the court further order that the custody of said children be awarded to the petitioner during the absence of their said guardian.

The plaintiff in error answered this petition admitting her marriage to Holloway and her appointment as guardian and that no provision was made for the petitioner to visit the children and that no request for such provision was made by him and that she contemplated a visit to California and alleged that on May 27th, 1898, by the Circuit Court of the First Circuit she was granted an absolute divorce from the petitioner and that by the decree of divorce she was given the care and custody of said minors and that since said date she has had the continuous care and custody of them; that the petitioner also has married again; that it is not for the benefit of said children that their custody be given to petitioner and that said minors do not desire their care and custody changed.

At the hearing the Circuit Judge expressed grave doubts of his jurisdiction in Probate to make the order but on consent of Mrs. Holloway he did make an order fixing a time for the petitioner to see said children and awarding him their care and custody for such time.

Mrs. Holloway afterwards sued out a writ of error from this court assigning as error (1) that the Circuit Judge sitting in probate had no jurisdiction "to make and render said order and decree," (2) "that the said order and decree was and is absolutely void."

On the hearing in this court the defendant in error presented a motion to quash the writ on a number of grounds. The principal one is that no writ of error lies to review the decision, order, judgment or decree of a court of probate.

It is urged in support of the motion that the provision of the statute authorizing appeals in probate proceedings is exclusive and prohibits the use of the writ of error in such cases; again, that a writ of error will not run to a judge of probate for the

reason that proceedings before him are not usually according to the course of the common law. Again it is contended that an analysis of the statute authorizing the writ demonstrates that only the common law writ of error was contemplated by the legislature enacting the statute.

Chapter 93, Civil Laws, providing for the writ was approved January 11th, 1893, (Session Laws, 1892, pp. 272, 275), after the act to reorganize the Judiciary (Session Laws, 1892, pp. 90, 125), in which is found the provision for appeals in probate proceedings, was in force, and this act as passed by the legislature was entitled "An Act to define writs of error."

The first section reads: "A writ of error may be had by any party deeming himself aggrieved by the decision of any Justice, Judge or Magistrate, or by the decision of any court except the Supreme Court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment. (Sec. 1443, C. L.)

The third section provides that, "A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law; provided, however, that no writ of error shall issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error." (Sec. 1445, C. L.)

A reading of the above sections seems to be a full and complete answer to all of the objections raised by the motion. The fact that this statute was passed subsequently to the statute providing for appeals and exceptions is a complete refutation of the claim that the statute of appeals was an exclusive method of presenting questions in probate proceedings to the appellate court for review.

Any person deeming himself aggrieved by the decision of any (1) Justice, (2) Judge, (3) Magistrate, (4) Court, except the Supreme Court, (5) or by the verdict of a jury may cause the writ to issue and the writ issues "to correct any error appearing on the record" or for any cause which might be assigned as error at common law. The writ authorized by this statute is broader than the common law writ of error and seems to cover all cases, except as otherwise provided in the statute, that might be brought

up for review by appeal or exceptions and to be a concurrent method, with appeal and exceptions, for presenting causes to this court.

This view of the statute was announced by this Court a short time after the writ of error statute was enacted (1895), in a case wherein it was said, "But the statute now makes a writ of error and a bill of exceptions concurrent methods for the correcting of errors made in the lower courts, the conditions and limitations in each method being different." *Cummings v. Iaukea*, 10 Haw. 1-4.

The long established practice in this court strongly emphasizes the correctness of the above interpretation. In *Peacock v. Lovejoy*, 5 Haw. 238, it was said: "The writ gives times to discover errors of law which the hurry incident to an appeal may have caused to be overlooked. The different remedies seem wise and consistent."

The writ has issued from this Court to review alleged errors in a decree in equity (*Vierra v. Hackfeld*, 8 Haw. 436); to review proceedings in Probate in the Circuit Court (*Phelps v. Carter*, 9 Haw. 638); the decision of a district magistrate, (*Lee Yau et al. v. The Republic*, 11 Haw. 143); the decision of a Circuit Judge, (*V. S. & T. Co. v. Hayashi*, 13 Haw. 695); the verdict of a jury rendered in the Circuit Court, (*Pringle v. H. M. Co.*, *Id* 705).

In view of these decisions we feel confident in the correctness of our conclusion that the writ may issue to review the order or decree of a Circuit Judge sitting in Probate. The motion to quash will be denied.

On the merits of the cause but one question is raised by the assignment of errors, i. e., did the Circuit Judge, sitting in Probate, at Chambers, have jurisdiction to make the order complained of?

The decree of divorce was granted upon the petition of the plaintiff in error by the Circuit Court of the First Circuit at term. The defendant in error filed a written appearance in said action but did not contest it. The decree was granted as prayed

in the petition and the custody of the two minor children awarded to the plaintiff. The statute authorizing this decree reads: "Upon annulling a marriage, or decreeing a divorce, the court may make such further decree as it shall deem expedient, concerning the care, custody, education and maintenance of the minor children of the parties, and determine with which of the parents the children or any of them shall remain; and the court may from time to time afterwards, on the petition of either of the parties, revise and alter such decree concerning the children, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require." (Sec. 1944, C. L.)

This decree was not appealed from, nor has application been made to the court rendering it to modify or revise the same. It will be observed that it is the *Court* and not the Judge that is authorized to "revise and alter such decree concerning the children."

The order appointing the plaintiff in error guardian of the wards did not in any way revise or modify the decree of divorce giving her their custody. The order complained of giving the defendant in error their custody for certain time did change, revise and modify the decree of divorce.

No statute has been called to our attention giving the Judge of Probate specific authority to make the order in question. The defendant in error in supporting the order seems to rely on two grounds; (1) the general jurisdiction of the Probate Court over the person and estates of minors; (2) the consent of the plaintiff in error to the making of the order.

The order cannot be supported on either of these grounds. The status of these minors and their custody was determined by the decree of the Circuit Court, at term, the only court having jurisdiction of the subject matter, and of the persons of the parties. The same court is given specific authority to "revise and alter such decree concerning the children" but a probate judge has no such authority and cannot make a legal order changing the custody of the children. A well considered case on this question is *Hoffman v. Hoffman*, 15 Ohio State 427. Nor could the consent of the plaintiff in error give the Probate Judge power to

make the order. It is an elementary principle that consent of parties cannot give a judge or court jurisdiction of the subject matter of a controversy. *Est. of Bishop*, 11 Haw. 33; *Tong On n. Tai Kee*, 11 Haw. 424.

The cause is remanded to the Judge of the First Circuit Court, at Chambers, in Probate, with direction to set aside and vacate the order set out in the petition for writ of error and to dismiss the defendant in error's petition for said order.

Robertson & Wilder for plaintiff in error.

Magoon & Dillon for defendant in error.

S. TOMIKAWA v. U. GAMA.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED MARCH 5, 1902.

DECIDED APRIL 11, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a suit for the specific performance of a contract for the sale of land, held, that, assuming that time was originally intended to be of the essence of the contract, the provisions in this respect were waived by the seller by the acceptance of installments on account of the purchase price after the time specified for their payment had passed.

OPINION OF THE COURT BY PERRY, J.

Bill in equity for the specific performance of a contract for the sale of certain land situate at Olaa, Hawaii. The court below, after trial and reference to a Master to ascertain the amount due on the contract by complainant to respondent and after report stating such amount to be \$833.35 and confirmation thereof,

decreed specific performance of the agreement to convey upon payment by the complainant of the amount so found to be due. From that decree respondent appealed.

The defense mainly relied upon is that the complainant failed to pay certain of the installments of the purchase price at the times agreed upon and that time was of the essence of the contract. The purchase price was \$3950 and this sum, as was specified in the agreement, was to be paid on certain dates named in installments varying from \$10 to \$1350 each. Tomikawa was to have immediate possession of the land and use the fruits and profits thereof subject to the conditions of the agreement. The instrument also contained the following: "In the event of a failure to comply with the terms and conditions herein contained by the said party of the second part, the said party of the first part shall be released from all obligations in law and equity to convey the said property and the said party of the second part shall forfeit all right thereto together with all improvements made or erected thereon and all moneys paid hereunder. And the said party of the first part on receiving such payments at the time and in the manner above set out agrees to execute and deliver to the said party of the second part * * * a good and sufficient deed," etc. It is undisputed that the complainant failed to strictly perform his part of the contract as to the time of payment.

In equity time is not regarded as of the essence of a contract unless an intention to make it so clearly appears. *Bohnenberg v. Zimmermann*, 13 Haw. 4, 6. The question of how the agreement in the case at bar should be construed in this respect is, perhaps, susceptible of argument on both sides; but it need not be decided. Assuming that originally it was the intention of the parties to make time an essential, the evidence clearly shows that in that respect the provisions of the contract were subsequently waived by the respondent. Of eighteen installments paid and accepted on account of the purchase price and ranging in amount from \$10 to \$460, one only was paid on the day named; all of the others were paid after the time specified, some of them sev-

eral months after they became due. Four at least of the later payments were in lump sums and were made and received generally on account of the existing indebtedness without any attempt to apply them specifically to certain of the installments due. Interest was paid and accepted on some of the overdue items.

According to the contract, which was entered into in August, 1896, the payment of the purchase price should have been completed on March 15, 1899. In August, 1900, many installments being then overdue, respondent made several demands upon complainant for payment. On the 2nd of that month \$200 was paid on account. Gama or his agent still regarded the contract as in force, for a few days later the latter said to one representing Tomikawa that if the claim was paid in full "then I would not take any steps to sue in anything, but if you hesitate to do anything I will say that I will call the contract forfeited." On August 17, \$800 was paid, not for an extension of time, as now claimed by the respondent, but on account of the purchase price as the evidence abundantly shows. The parties at the time signed a memorandum whereby, after reciting that Gama was "the holder of certain claims" against Tomikawa and that the latter was not "in possession of immediate funds with which to pay said claims," it was "agreed by and between the parties hereto that upon the payment of the sum of \$800 upon the execution of this memorandum, the receipt of which is hereby acknowledged, the party of the first part" (Gama) "agrees, in consideration of the above payment, not to make any further demands against the said J. W. Mason" (representative of Tomikawa) "for the period of forty-five days from the date of this memorandum." On October 1, 1900, \$300 more was paid on account of the purchase price and the following, unsigned, was endorsed on the instrument last referred to: "From Oct. 1st an extension of 30 days. \$300 paid."

On behalf of the respondent it is contended that by the execution of the memorandum the parties agreed to make time of the essence of the original contract and to place it within the power

of Gama to enforce a forfeiture in case of failure on Tomikawa's part to pay the balance due within the forty-five days and the thirty days additional. The language of the memorandum seems to us to be incapable of this construction. We do not so construe it. All that Gama thereby agreed to do was "not to make any further demands" during the periods named. The word "demands" here means requests *for payment* of claims referred to in the memorandum.

Until December 27, 1900, the contract was regarded by Gama, as well as by Tomikawa, as being in force. This is shown by the fact that on that date Gama wrote to Mason, giving notice that the contract "is *hereby* rescinded and avoided," stating his reason for the action and adding: "I *hereby* declare all rights on your behalf forfeited and annulled and all agreements concerning the said land made since said date *are* also declared forfeited for like reasons." Mason, on behalf of Tomikawa, had, either on that same day or on the day previous, offered (though without a tender in coin) to pay to Gama's agent the whole amount due under the contract, this being in answer to a suggestion of Gama's agent that he would execute a deed on payment of \$2000 in addition to the balance due. This suit was filed on December 31, 1900.

It is further contended that the complainant abandoned the contract some time before its forfeiture was declared. Upon the evidence we find that there was no such abandonment.

Some minor points have been presented on behalf of the appellant. In passing upon them we refer briefly to a few only. The fact that the complainant testified at the trial that the amount due under the agreement was \$1290.75 and that he was willing to pay that sum, does not estop him from claiming the benefit of the Master's finding that the sum due is \$833.35. No attempt is made to show that the Master's finding was not in fact correct; it was confirmed by the court. The Master was properly authorized to take evidence on the issues of fact referred to him. 17 Encycl. Pl. & Pr. 983. The question as to the irregularity of the proceedings had before the Master because of his failure

to take an oath before receiving the evidence, was waived by a stipulation entered into by the parties and now on file.

The decree appealed from is affirmed.

Smith & Parsons for complainant.

W. S. Wise and *Fitch & Thompson* for respondent.

JOHN T. BAKER v. MILIAMA PUNI.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED MARCH 5, 1902.

DECIDED APRIL 14, 1902.

FREAR, C.J., AND PERRY, J.

One who has the fee in one half and remainder in the other half of a piece of land may have partition as against the life-tenant of the latter half.

A conveyance in fee simple with a reservation or exception of a right in the grantor "to jointly use and occupy said property during her natural life, together with the grantee," does not leave in the grantor a life interest in more than one half the property, nor does it create such a personal relation between the grantor and grantee, who were mother and daughter, as to prevent the latter from alienating her interest.

OPINION OF THE COURT BY FREAR, C.J.

This is a suit for the partition of certain land at Kukuau, Hilo, Hawaii, covered by R. P. 4,523, L. C. A. 234, and containing 56-100 of an acre, and the question is whether the estates of the plaintiff and defendant are such as can be partitioned.

The defendant, who was formerly sole owner, conveyed by

warranty deed this land "with all the privileges thereunto belonging or in any wise appertaining" to her daughter and "her heirs and assigns forever," but inserted in the deed after the warranty clause the following: "And the said Miliani Puni the grantor herein expressly reserves the right to jointly use and occupy said property during her natural life, together with the grantee." Afterwards the daughter by warranty deed in similar language conveyed the land to the plaintiff, but after the covenant that the land was free of all incumbrances inserted the following: "save and except that the grantor herein reserve to Miliama Puni of Hilo, Hawaii, Hawaiian Islands, the right to jointly use and occupy the same during her natural life."

The reservation in the daughter's deed of course did not affect the mother. It operated at most merely as an exception to what was granted so as to relieve the daughter from liability on her covenants after in terms granting the whole land in fee to the plaintiff. The plaintiff stands in the daughter's place, except that he would now be a tenant in common with the defendant if the daughter had been a joint tenant with her. The question is, what estates did the mother and daughter have after the execution of the mother's deed?

If the daughter had a fee simple subject to a life estate in the mother in one-half of the land, then each would have a present right of possession and could sue for a partition. *Allen v. Libbey*, 140 Mass. 82. This was the view taken by a former Circuit Judge on demurrer, but the present Circuit Judge, after a hearing on the merits, took the view that the defendant retained a life interest in the whole of the land and that her daughter, and afterwards the plaintiff, took merely an estate *in futuro* and that therefore the latter was not entitled to a partition. It is from the decree based on this view dismissing the bill that the plaintiff appeals.

We need not express an opinion as to the effect or meaning of the clause of reservation or exception in the mother's deed. It seems to be agreed by counsel that it operated to give or leave to her a life estate. In our opinion it did not give or leave to her

a life estate in more than one-half of the land. The clause purports to do no more than reserve to her "the right to jointly use and occupy said property during her natural life, together with the grantee." The land had in terms been granted absolutely in fee simple. The clause in question then at most gave or left to the grantor the right to use and occupy the land with the grantee. The grantee was not, as held by the Circuit Judge, given merely an estate *in futuro* with permission to live with the grantor during the latter's life, if she care to.

Nor can we hold, as contended by counsel, that the joint occupancy contemplated was of such a personal nature as not to permit of an alienation of the daughter's interest or at least an occupancy by a stranger in her place. The mother very likely did not contemplate the possibility that her daughter might convey her interest, but she did not effectually provide against such a contingency, assuming that she could have done so consistently with the rules of law. It is true, as suggested by counsel, that the words "heirs and assigns" are not found after the words "grantee" in this clause. But this would if anything tend to show that the grantor could not occupy after the death of the grantee or a conveyance by her rather than that the grantee's rights could not pass to others by descent or conveyance during the grantor's life. For, as already stated, the conveyance was to the grantee absolutely in fee simple, and the grantor thereafter had merely what she reserved or excepted, that is, a right to jointly use and occupy with the grantee. However, we think there was no intention to limit the grantor's use and occupancy to the grantee's life or to the period of her ownership or occupancy.

The appeal is sustained, the decree appealed from reversed and the case remitted to the Circuit Judge for further proceedings consistent with the foregoing opinion.

Chas. M. Le Blond and *Smith & Parsons* for plaintiff.

W. S. Wise and *Fitch & Thompson* for defendant.

A. W. VALKENBERG v. TREASURER of the Territory of
Hawaii.

APPEAL FROM THE ASSESSMENT OF STAMP DUTY MADE BY THE
TREASURER.

SUBMITTED MARCH 13, 1902.

DECIDED APRIL 14, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A proxy, or written authority, of a shareholder in a corporation empowering another to vote his stock at a designated meeting, or meetings, of the stockholders of the corporation is not a power of attorney within the intent and meaning of section 941, C. L., and is not subject to the stamp duty imposed by said statute.

OPINION OF THE COURT BY GALBRAITH, J.

The appellant, a shareholder in a Hawaiian corporation, appointed a third party his agent, or proxy, to act and vote for him at a designated meeting of the stockholders of the corporation. The appointment was in writing and in form bore some resemblance to a power of attorney but was not under seal or acknowledged. It was headed "Stockholder's proxy." The Treasurer of the Territory, ruled that this writing was a power of attorney and subject to a stamp duty of \$1.00 under Section 941, C. L. The appellant being dissatisfied with this ruling paid the duty and perfected an appeal to this court as provided in Sec. 931, C. L.

This appeal presents for construction one of the provisions of the statute providing for stamp duties on certain written instruments (Chapter 64, C. L.). The first section of this statute reads: "From and after the coming into operation of this Act, there shall be due and payable to the Government in respect of the several deeds, documents, and instruments mentioned and spec-

ified in the schedule hereunder written, the several sums of money for stamp duty set forth in said schedule." (Sec. 918, C. L.)

One item of the schedule, and the one under which the written instrument given by the appellant was taxed, is as follows: "Power of attorney\$1.00" (Sec. 941, C. L.)

"It is a general rule," says Mr. Justice Story, "in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes levying taxes or duties are construed most strongly against the Government and in favor of the subject or citizen, because burdens are not to be imposed or presumed to be imposed beyond what the statutes expressly and clearly import." *United States v. Wigglesworth*, 2 Story (U. S.) 369, 373 and 374.

Mr. Justice Agnew speaking for the Supreme Court of Pennsylvania, said: "A tax law (and a stamp act for the purpose of revenue is such) cannot be extended by construction to things not named or described as the subject of taxation." *Boyd v. Hood*, 57 Penn. St. p. 98-101.

Each of the above cases are referred to with approval in Sutherland on Statutory Construction, p. 458.

The same principles have been announced by this court, in construing the statute under consideration as follows. "In passing tax bills legislatures are presumed to be careful to include in the schedules all the items upon which they intend a tax to be levied, and to express themselves so clearly that there can be no reasonable doubt as to the articles intended to be taxed. Statutes imposing taxes ought not to be construed so as to include articles or (in this case) instruments not clearly coming within them. For instance, a statute levying a tax on horses would not include mules, and one levying a tax on mules would not include asses." *The Minister v. Bishop & Co.*, 3 Haw. 793, 794.

There is some resemblance between a power of attorney and a proxy, (possibly as much as between a horse and a mule). Each, when in writing, is the evidence of the authority of the

person named therein to do some specified act or thing for and in the place of the person issuing it. With this likeness the resemblance disappears as distinctly as the similarity between the horse and his meek relation. They differ not only in the object and purpose for which they are given but in the formality of their execution. The one is usually executed with the same formality as a deed and the other is not. This difference is well understood in the business community. No business man of ordinary intelligence would speak of giving a proxy to authorize another to convey his land. Nor would he think of giving a power of attorney to authorize one to vote his stock in a corporation meeting. The members of the legislature that enacted this statute are presumed to have been men of ordinary intelligence and to have known the well understood difference between a proxy and power of attorney. That a proxy was not named in the schedule by specific and clear language must be taken as conclusive evidence of the intention of the legislature not to include such instrument among the subjects of taxation. Any other conclusion would be extending the provisions of the statute by implication beyond the clear import of the language used and enlarging their operation, on the theory of analogy, so as to embrace matters not specifically pointed out and a construction of the statute most strongly against the citizen in direct violation of the rules of interpretation herein before cited.

We conclude that the proxy or instrument submitted was not subject to the stamp duty collected by the Treasurer.

Let judgment be entered accordingly.

Smith & Lewis for appellant.

E. P. Dole, Attorney-General, for the Treasurer.

CONCURRING OPINION OF FREAR, C.J.

There is no doubt that, technically speaking, a proxy is a power of attorney, as it is a written authority to one to act in the place of another; and for this reason my first impression was that it would have to be stamped under the statute. But upon reflection I have come to a different conclusion.

The question is not merely whether a proxy is a power of attorney, but whether the legislature intended it to be taxed under that head. The statute must be construed strictly and not made to cover objects not clearly within the intention of the legislature. It seems to me that proxies are of such common use and so universally considered as constituting a class by themselves, as well as known by a special name, that the legislature would have shown clearly that it meant to tax them if it really did mean to. This line of reasoning was adopted in *Minister of Finance v. Bishop & Co.*, 3 Haw. 793, in a case so analogous to this as to make it almost an authority in the present case. In that case it was held that neither promissory notes, checks nor certificates of deposit were "agreements" within the meaning of the stamp act, although they all were agreements technically speaking; also that a check was not a "bill of exchange" within the meaning of that act, though it was technically a bill of exchange; and that a certificate of deposit was not a "promissory note" under the statute, although it was governed by the rules applicable to promissory notes. The court said:

"The words of any statute are to be taken in their ordinary and usual signification, and although a promissory note is an agreement to pay money, yet, no one in reading this statute, would consider the word 'agreement' as used therein to have such a signification as would include either of the instruments which are the subjects of our consideration. * * *

"It is true that a check has been asserted to be a bill of exchange. * * * But checks are a species of paper of such common use that if the legislature had intended to include them they would have mentioned them by their name. In common language, no one, speaking of a bill of exchange would be understood as meaning a check. * * *

"The Act is to be taken strictly; none of the expressions of this Act are strictly and technically applicable to certificates of deposit. In this country certificates of deposit are too frequent and notorious a species of paper to have been omitted by mistake, and it is a rule of construction that when a statute, and more especially a statute with penalties for neglect, specifies particulars, all other particulars not enumerated are excluded.

"Although certificates of deposit possess all the requisites of

promissory notes, and the endorsers are to be held in like manner as in ordinary promissory notes and all the rules applicable to promissory notes are to be applied, when such certificates are sued upon, yet we cannot but think that if the legislature had intended to tax them by this law, they would have mentioned them specifically, more especially, considering the manner in which they had been used as currency in this kingdom."

The fact that, notwithstanding the frequent use of proxies in these islands with their great number of corporations with widely scattered stock, no one, so far as we are aware, has ever thought of stamping proxies during the quarter of a century during which the stamp act has been in force, until the separate provision for stamps on proxies in the federal stamp act recently suggested the question, not only shows the common understanding that proxies stand in a class by themselves but also supports the view that the legislature did not intend that they should be taxed.

We cannot get much assistance from authorities elsewhere on this point. In England the statute was much more explicit: "Letter or power of attorney made by any petty officer, seaman, marine, or soldier serving as a marine, or by executors or administrators of any such person for receiving prize money, 1s." "And for receiving wages, 1l." "Letter of attorney for the sale, transfer, acceptance or receipt of dividends of any government or parliamentary stocks or funds, 1l. 10s." "Letter or power of attorney of any other kind, or commission or factory in the nature thereof, and every deed or other instrument of procuration, 1l, 10s." In *Monmouthshire Canal Co. v. Kendall*, 4 Barn. & Ald. 453, the question arose whether under this statute a proxy had to be stamped, but the court found it unnecessary to pass upon it. Counsel argued that "at all events it is an instrument of procuration," if not a letter of attorney, for "the very word proxy, which is an abbreviation of the word procuracy, shews this." But in *The Queen v. Kelk*, 12 Ad. & Ell. 559, the question was passed upon. The proxy was held to be "either a letter of attorney or an instrument of procuration." When we consider the particularity of the first two clauses of the statute

and then the sweeping nature of the last clause, we can readily see how the court could come to that conclusion without militating against the reasoning adopted in the case in the 3rd. Hawaiian above cited.

DISSENTING OPINION OF PERRY, J.

This is an appeal from a ruling of the Treasurer to the effect that a certain instrument is subject to stamp duty under Section 918 and that portion of the schedule in Section 941, Chapter 64, of the Civil Laws, which reads, "Power of Attorney, \$1.00." The instrument referred to is in the following language:

"Stockholders' Proxy.

"Know all men by these presents, that I, A. W. Van Valkenberg, do hereby constitute and appoint E. E. Paxton for me and in my name, place and stead, to vote as my proxy at any ordinary, extraordinary or general meeting of the stockholders of The B. F. Dillingham Company, Ltd., an Hawaiian corporation, held subsequent to this date or at any adjournment thereof (until this proxy has been revoked), and upon any question which may be brought before such meetings, including the election of directors, according to the number of votes I should be entitled to vote if then personally present.

"In Witness Whereof, I have hereunto set my hand this 8th day of March, A. D. 1902.

(Signed) "A. W. Van Valkenberg."

A power of attorney is "an instrument authorizing a person to act as the agent or attorney of the person granting it."—2 Bouvier 714.—"A letter or power of attorney is constantly spoken of as the formal instrument by which an agency is created."—*Ib.* 116. "The right on the part of the agent to act in the name or on behalf of another is termed his authority or power to act, and this, if conferred formally by an instrument in writing and under seal, is said to be conferred by a letter of attorney or power of attorney."—1 Am. & Eng. Encycl. Law, 2nd ed., 938. In this Territory, a power of attorney need not be under seal. Even in the case of a deed of land, a seal is not essential to validity. *Wood v. Ladd*, 1 Haw. 23; *Campbell v.*

Manu, 4 Haw. 459. So, also, acknowledgment or lack of acknowledgment does not determine the character of the writing. The instrument in the case at bar is clearly a power of attorney and therefore within the letter of the statute.

It is contended, however, that, in the popular mind, proxies stand in a class by themselves and are never known as powers of attorney and that therefore the legislature, having failed to include proxies by name, must be presumed to have intended other powers of attorney only, or, at least, that the matter is one involved in some doubt and that consequently the statute must be construed in favor of the taxpayer.

The general principles applicable in the construction of doubtful tax statutes are undoubtedly stated correctly in the prevailing opinions. Nevertheless, it seems to me that under the facts of this case the taxpayer should not prevail. The general question of the taxability of any or all proxies is not now before us; the only question presented by the appeal is whether the particular instrument above set forth is subject to the tax. I take it that it is recognized by the business community and by laymen in general as well as by lawyers that the authority to vote stock at all future meetings of a designated corporation may be delegated or conferred by a formal power of attorney as well as by the informal instrument known as a proxy. The distinction here sought to be drawn is recognized in the U. S. war tax Act of June, 1898, in its provision imposing a tax on, "Power of attorney or proxy for voting" at corporation elections. Vol. 30, Statutes at Large, p. 462. The instrument under consideration is a formal power of attorney, using that term even in the sense in which, as I believe, it is understood by laymen. That it may also be called a proxy cannot, under the circumstances, affect the result. Assuming, then, for the purposes of this case, that under the title, "power of attorney," the legislature intended to tax only those instruments which are understood by laymen to be powers of attorney, the instrument in question is a power of attorney within the meaning of the statute.

In *The Queen v. Kelk*, 12 Ad. & El. 559, a proxy was held

to be "either a letter of attorney or an instrument of procuration." That case is sought to be distinguished on the ground that in England the statute was more explicit. The language of that statute (it is set forth in the opinion of the Chief Justice in this case) is not broader, however, than the simple title contained in ours, "Power of Attorney." The court said: "As therefore, Mr. Burnaby was by the instrument in question substituted for the proprietors signing, and appointed to act for them, we do not see how it is possible to deny that the writing by which he was so appointed is either a letter of attorney or an instrument of procuration." The case goes perhaps further than it is necessary to go in the present case and would seem to be an authority in support of the view that any proxy would be a power of attorney within the meaning of our statute.

HAKALAU PLANTATION COMPANY, LIMITED, v. W.
Z. KAHUENA, Administrator of the Estate of S. E.
Kahuena, deceased, Kuakea, Elemakule and Kalili.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED MARCH 7, 1902.

DECIDED APRIL 16, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An answer of general denial (Civ. L., Secs. 1223-4) in an action to quiet title (Civ. L., Secs. 1773-6) does not operate as a disclaimer—either as amounting to a specific denial of the plaintiff's allegation that the defendant claims adversely, or as not setting forth specifically the defendant's adverse claim.

The usual code specific answer distinguished from the general denial under our statute which permits "any matter of law or fact whatever" to be given "as a defense in any civil action."

Under either the code specific denial or our general denial, a defendant in an action to quiet title may, if he does not disclaim, at least put the plaintiff to the proof of his (plaintiff's) claim; and under the general denial under our statute he may also prove his own claim without specifically pleading it, although as a rule he cannot do so under the code system of pleading.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

This is a statutory action to quiet title under Civ. L., Ch. 113. The plaintiff alleged, as is usual in such cases, (1) that it had title, (2) that the defendants claimed adversely and (3) that their claim was unfounded. The defendants answered with a general denial. The Circuit Court, holding that this answer amounted to a disclaimer and that it put the defendants out of court, allowed the plaintiff to prove its case, and not only did not permit the defendants to prove any adverse claim, but refused to permit them to controvert the plaintiff's claim by objecting to the plaintiff's offered evidence or otherwise, and finally instructed the jury to find for the plaintiff.

The question now raised on defendant's exceptions is, what was the effect of their answer of general denial? It is contended that that answer amounted to a disclaimer for two reasons: (1) because it operated as a specific denial of the allegation in the complaint that the defendants claimed adversely and (2) because, from the nature of an action to quiet title, the defendant must in answering either disclaim or set out his claim, and that if he does not do the latter he must be taken to have done the former. We cannot sustain either contention.

As to the first proposition—the effect of a general denial in a case of this kind as a mere question of pleading—two classes of statutes must be distinguished. First, the usual provisions in the code states, which require that the answer shall contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or (3) counter-claim, in or

dinary and concise language without repetition; and, secondly, provisions, such as are found in our statutes, which provide merely for an answer "denying the truth of the facts stated in the petition" and that under such an answer "the defendant may give in evidence, as a defense to any civil action, any matter of law or fact whatever." Civ. L., Secs. 1223, 1224. The code system is essentially one of specific pleading. It contemplates all sorts of answers to meet the various cases, with a view to apprising the plaintiff of the precise claim of the defendant. It requires a denial of each material allegation of the complaint controverted, and if a general denial is made it is only for convenience when every material allegation of the complaint is controverted, the general denial being regarded as a specific denial of each material allegation. Under a denial, whether general or specific, only the truth of the allegations made can be controverted. Many matters though properly defenses cannot be set up unless they go strictly to deny the truth of the allegations made, as, for instance, the statute of limitations or payment, these being regarded as "new matter" which must be specially set up. Moreover, under the codes, the answer is generally required to be under oath and must therefore be particular so that perjury can be assigned on it if false in any respect. See, in general, Bliss, Code Pl., Ch. XVI *et seq.* Under statutes like ours, however, there is but one form of answer provided for, a general denial, whether others are permissible or not, and it is expressly provided that under it any matter of law or fact whatever may be set up by way of defense. It need not be and in practice is not under oath. It is intended to be and is in practice used merely as a means of denying the plaintiff's right of action and the defendant's liability generally, and not as denying each allegation of the complaint specifically. In this respect it is much like the general issue, as the latter gradually grew to be at common law, so far as the matters that can be set up under it are concerned. Accordingly many matters can be set up under it, such as the statute of limitations and payment, which, as we have seen, can not as a rule be set up under the codes

unless specially pleaded. It is true, notice must, or at least formerly had to be given here of these defenses, but that was not under the statute but by rule of court. It is true also that a set-off can not be set up under a general denial, but that is because it is not a matter of defense to the claim sued on but rather in the nature of a cross-complaint. *Lopez v. McChesney*, 10 Haw. 225, 226.

Not a single authority has come to our notice holding under either of the two classes of statutes above referred to, that a general denial operates as a disclaimer, when the complaint contains an allegation that the defendant claims an interest. The statute in California is of the first class. Under that, in *Elder v. Spinks*, 53 Cal. 293, the majority of the court held that the allegation that defendants claimed an interest was not material and that therefore the general denial was not a disclaimer, while the minority held that the allegation was material and that the general denial put it in issue but nevertheless held with the majority that the general denial did not operate as a disclaimer. The statute in Indiana is of the other class. In *Ratliff v. Stretch*, 117 Ind. 526, which was an action to quiet title under a statute similar to ours, the court held that it was harmless error to sustain a demurrer to certain affirmative answers that were set up in addition to a general denial, for the reason that, as the action was one "to quiet title, all defenses, both legal and equitable, could have been given in evidence under the general denial," citing previous Indiana cases to the same effect.

The other contention, that the defendants put themselves out of court as if they had filed a disclaimer, merely because they did not affirmatively and specifically set up their adverse claim, if they had any, while at first thought equally surprising with the first contention in view of the past practice here, presents a question of considerable difficulty in view of the authorities elsewhere. On this question courts elsewhere seem to have taken all sorts of views, in many instances reversing themselves. We need not consider cases elsewhere that have been overruled or cases in which there were express or clearly implied actual dis-

claimers, though accompanied with affirmative answers that were held bad as matter of law. The question is, what are the rights of a defendant in an action of this kind under an answer of general denial? It must be conceded that *Wall v. Magnes*, 17 Colo. 476, (See also *Weston v. Estey*, 22 *Id.* 334) is a strong case to the effect that under a statute somewhat similar to ours, a defendant cannot, in an action of this kind, even put the plaintiff to his proof without first pleading himself the nature of his own adverse claim. But there are some considerations that weaken the force of that decision and others that distinguish it from the present case. In that case, the statute, unlike ours, gave a right of action only to one in possession. The court looked upon the statute as merely recognizing the familiar chancery proceeding by one in possession to quiet title and based its opinion largely on the practice in equity. There was but one form of action for law and equity cases in that state. The specific answer usually required in the code states was required in that state. The authorities relied on in that case were mostly in the form of *dicta* found in cases that held that the plaintiff need not set forth the defendant's claim in order to require the latter to answer. The court also failed to distinguish between cases in which the answer contained a disclaimer and those in which the answer merely did not set up the adverse claim affirmatively. The authorities relied on were United States, Missouri, California and Indiana cases. But there is much to be found in cases in all those jurisdictions, to say nothing of others, that goes to show that where there is not a disclaimer the defendant may still insist at least on the plaintiff's making out his own case.

In one of the United States cases, *Stark v. Starrs*, 6 Wall. 402, the court said:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that, 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or

title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

In *Babc v. Phelps*, 65 Mo. 27, the court said:

"Under the statute authorizing the proceeding instituted in this case it is made an indispensable condition to its maintenance that the plaintiff should be in the actual possession of the real property the title of which he seeks to have quieted or settled. It was therefore the right of the defendant to deny, as he did in his answer, the fact of possession alleged by plaintiff in his petition, and possession having been denied an issue was presented, which it was the duty of the court to try before making an order requiring defendant to institute his suit to try his title."

In *Pennie v. Hildreth*, 81 Cal. 127, the court, referring to the contention that an answer of general denial in an action of this kind presented no issue to be tried, said:

"This is based upon the theory that in this class of cases the only course for a defendant to take is to set up affirmatively his adverse claim to the land or disclaim. They cite in support of this position *Tompkins v. Sprout*, 55 Cal. 36; *People v. Center*, 66 Cal. 551. These cases do not support the position taken by the respondent. They simply hold that, in order to maintain his defense on the ground of an adverse claim, a defendant must set up such claim, and that the owner in possession may require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined. But the basis of his right to require the adverse interest to be produced and adjudicated is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case. If it is denied, a material issue is raised, which casts upon him the burden of proving such interest or ownership. Until he does this, the defendant is not called upon to produce or prove his claim. Therefore the general denial put in issue a fact necessary to the plaintiff's recovery, and the demurrer to it was improperly sustained. * * * The correctness of the rule that a plaintiff must prove, under a general denial, either that the defendant claims an interest in the land, or that his claim is unfounded, may be a matter of question; but there is no question in our minds that such an answer renders it absolutely necessary

for him to prove his own title or interest in the land, and that without such proof he is not entitled to judgment."

See also *Wheeler v. Winnebago Paper Mills*, 62 Minn. 429; *Sklower v. Abbott*, 19 Mont. 228 (47 Pac. 901). All these cases were decided under statutes requiring specific answers. They seem to show that the Colorado case was erroneous in so far at least as it held that a defendant could not put the plaintiff to his proof unless he himself affirmatively set up his adverse claim even though he did not disclaim. It may be that the weight of authority supports the Colorado case to the extent of holding that if the defendant does not set forth in his answer his adverse claim in an action of this kind under the code system of pleading, he can not set it up at the trial, but, in our opinion, the weight of authority does not go to the extent of holding, even under the code pleading, that he cannot, when he has not disclaimed, put the plaintiff to his proof. This would seem to be in harmony with general principles also. For, why should a party who has no right, title or interest whatever in or to the land and who perhaps is not even in possession, as he is not required to be under our statute, be permitted to put another, who has a claim or an interest, to the expense and annoyance of setting up and proving his claim or interest and perhaps disclosing what might invite other contests or prejudice him therein? Accordingly the Circuit Court in this case should at least have permitted the defendants to put the plaintiff to its proof of the allegations the truth of which was necessary to enable it to maintain its action, and for this reason at least a new trial should be ordered, with permission to the defendants to amend their answer, if necessary, in order to enable them to set up their adverse claim. The defendant was given such leave even in the Colorado case although no amendment had been prayed or granted in the trial court.

But under our statutes, need they amend their answer in order to set up their adverse claim? It may be the better doctrine or the better practice that defendants should be required, as is often held under other statutes elsewhere, to set forth in their plead-

ings in actions of this kind their adverse claims in order to be permitted to prove them at the trial, and perhaps this would be a proper subject for a rule of court, but, in our opinion, it is not necessary to do so under our statutes. The statute which provides for actions of this kind does not in terms require it (any more than the statute that relates to actions of ejectment), although it provides that if the defendant disclaims or suffers judgment to be taken against him without answer, the plaintiff shall not recover costs—a very natural and proper provision in a statute of this kind. But there is nothing expressly requiring a defendant to set forth his claim affirmatively in his answer. True, this is so also in most statutes of this kind elsewhere; but, where an affirmative plea has been held necessary elsewhere, the code pleading has prevailed, law and equity proceedings have been united, and proceedings of this kind have been treated largely as recognitions of former equity proceedings. With us, the distinction between law and equity procedure has been maintained, actions to quiet title have been regarded as purely actions at law (*Kahoicai v. Limaeu*, 10 Haw. 507; *Flores v. Maka*, 11 *Id.* 512) and, what is of special importance, in any law case the answer, under our statute, may be a general denial under which “any matter of law or fact whatever” may be given as a defense. This provision has been regarded as applicable to all law cases and in the absence of any provision to the contrary we feel obliged to hold it applicable to actions to quiet title. This we believe has been the general understanding of the bench and the bar, as shown by the hitherto unquestioned practice. It seems to be the view taken elsewhere also under similar statutes, and this brings us to the Indiana cases referred to above as relied on in the Colorado case. In Indiana we believe there is but one form of action for law and equity cases, as in the code states, but the statute (Rev. Sts., Secs. 1070, 1072) relating to actions to quiet title is similar to ours and, what is of greater importance, the statute (Sec. 1050) relating to the form of answer and what may be shown under a general denial is similar to ours. As shown above, it has been held repeatedly in that state that defendants in

actions of this kind need not set forth their adverse claims in their answers for the reason that they can present any defense under the general denial. We have not found any decision *contra* under a similar statute.

The exceptions that raise the questions above discussed are sustained, the verdict and judgment below set aside and a new trial ordered.

Hatch & Silliman for plaintiff.

Smith & Parsons for defendants.

DISSENTING OPINION OF GALBRAITH, J.

The discussion in the majority opinion of the relative shades of difference and the delicate distinctions between code and other systems of pleading and practice is interesting and instructive but I cannot see that it is particularly pertinent to the issue in this case.

The action was brought under the provisions of Chapter 113, C. L. The first section of the statute (1773) authorizes the action to be brought "against another person, who claims adversely to the plaintiff an estate or interest in real property, for the purpose of determining such adverse claim." The clear language of this section leaves no doubt as to the object and purpose of the statute. The next section (1774) provides that any one may be made a defendant "who has, or claims an interest in the property adverse to the plaintiff." The last section (1776) reads: "If in such action the defendant disclaim in his answer any interest or estate in the property or suffers judgment to be taken against him without answer, the plaintiff shall not recover costs."

It is true that the action authorized by this statute is a civil action and is tried on the law side of the docket, still it is a particular kind of civil action and is authorized by a special statute. It has been held by this court that the enactment of this statute did not deprive the equity courts of jurisdiction in suits to quiet title. It was said, "although equity has cognizance of suits to quiet title in lands with more extensive and complete powers, the

legislature has seen fit to confer upon certain law courts this special right of action. The existence of a remedy in equity does not affect the right of the plaintiffs to choose and pursue the statutory remedy. We are not to consider the effectiveness of the statutory remedy, or whether some other form of action would be better suited to this case, provided plaintiffs here have substantially followed the statute." *Kahoiwai v. Limaue*, 10 Haw. 507, 509.

The provision of the statute which is claimed to authorize the answer of general denial in this action as in ordinary civil actions is found in the general statute relative to practice in courts of record. I contend that this action being authorized by a special statute is an exception to the general rules announced in section 1224, C. L. It is a familiar rule for the construction of statutes where there is a general and a particular law covering the same subject that the special law will be considered as an exception to the general law and will control. Sutherland on Statutory Constructions, Sec. 217. Again the language of Sec. 1224 is general in terms and contains no exceptions, still it is not of universal application in "civil actions." The courts have made exceptions to its application. Payment is a "matter of fact and of defense" but evidence of payment cannot be given under the general denial. (*Piipiilani v. Houghtailing*, 11 Haw. 100.) Again set-off is a "matter of fact and of defense" but evidence of set-off cannot be given under the general issue, it must be specially pleaded. (*Boyd v. Kaikainahaole*, 10 Haw. 456.) These decisions establish the fact that there are exceptions to the application of Sec. 1224 in ordinary "civil actions."

Bearing in mind the object of the statute as expressed in the first section and the provisions of the last section, it seems clear, that only two kinds of answer were contemplated by the "legislative mind in this statutory action to quiet title," to-wit, (1) An answer setting out in detail the nature and character of the defendant's adverse title or claim to the land described in plaintiff's petition. (2) An answer disclaiming any title or estate to the land adverse to the plaintiff. From the very nature of the

action no other answer is permissible. The object of the statute was to authorize a speedy method of trying an adverse claim, either real or imaginary, of an estate or title to land. If the adverse claim was real the first kind of answer would disclose it in detail or if the adverse claim was not real the second form of answer set the doubt at rest by denying that there was any adverse claim and leaving the plaintiff free to have his estate in the land confirmed by the judgment of the court without interference by the defendant. For if the defendant did not have any claim or estate in the land adverse to the plaintiff he had no further interest in the action other than to be protected from costs.

The general denial filed by the defendants was a specific denial of each of the allegations contained in the petition (*Stone v. Oneal*, 36 Minn. 46). It was a specific denial of the allegation that the defendant claimed a title or estate adverse to the plaintiff and, in effect, a disclaimer of such adverse interest. To contend that the general denial put the plaintiff to the proof of all of the material allegations of the petition including the adverse claim of the defendant is untenable and unreasonable. It was by virtue of this alleged adverse title or estate that the defendants were made parties to the suit. When the answer was filed they were no longer parties in interest to the litigation, if they did not claim an estate or interest in the land adverse to the plaintiff, and had no right to contest the claim of the plaintiff for the reason that their rights were not affected thereby. If they had any interest in the land the plaintiff had a right to be informed of the nature of the claim in the answer filed. The prayer of the answer that the defendants be dismissed with their costs seems to strongly support the theory that the attorneys who drafted the answer intended it as a disclaimer. The judgment complained of gave them all the relief asked, i. e., they were dismissed with costs.

It is claimed that the plaintiff did not treat the answer as a disclaimer, for if it had been so treated the plaintiff was entitled to judgment on the pleadings without trial. Admitting this to

be true I do not see what consolation the defendants are entitled to draw from it. If the plaintiff obtained as a result of a trial only that to which it was entitled on motion and without a trial I do not see that the defendants are in any way prejudiced thereby or have any right to be heard in protest against a proceeding that in no way affect their rights.

This conclusion is strongly supported by a decision of the Supreme Court of Colorado and the many cases referred to in that opinion. The statute of Colorado under consideration in that case is very similar to our own. The Court says: "These provisions simply recognize in statutory form the familiar chancery proceeding whereby a party in possession of real property might compel persons claiming adverse estates or interests to come into court, specify the nature of their claims and have them fully and finally adjudicated." * * *

"But the very essence of the enlarged statutory proceeding remains the same as it was in equity, viz., to compel one asserting an adverse interest in the property to aver and try such asserted interest. The words employed are: 'An action may be brought * * * for the purpose of determining such adverse claim, estate or interest.' No language could more plainly or more forcibly express the leading and controlling object of this legislation." * * *

"The statutory proceeding is in this respect unlike the action of ejectment; if defendant does not assert an adverse interest in himself, he cannot be permitted to put plaintiff upon proof of his possession and title." * * *

"It is for the defendant, if he relies upon an adverse interest, to plead its nature by answer." *Wall v. Magnes*, 17 Colo. 477, 478 and 479.

It appears that no request was made of the court below for permission to amend the answer. Defendants elected to stand on the general denial and I firmly believe that such answer was properly treated as a disclaimer under section 1776, C. L., and that the exceptions should be overruled.

THEO. H. DAVIES & CO., LTD., v. F. M. WAKEFIELD.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED MARCH 17, 1902.

DECIDED APRIL 23, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a suit in equity to foreclose a mortgage on real estate, the mortgagor and mortgagee being the only parties to the suit and the bill and answer being silent as to taxes delinquent, it is error for the court to decree that the taxes are a prior lien and must be paid first from proceeds of the sale of property.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff filed its bill in equity to foreclose mortgage with the usual allegations and prayer. The defendant appeared and confessed the bill and consented to a decree. An accounting was taken by the court and the amount due under the mortgage ascertained. The bill, and also the mortgage introduced in evidence, was silent as to taxes. The Tax Assessor of the district where the mortgaged premises are situated appeared at the accounting and advised the court that the taxes due on the land, amounting to \$11.50, were delinquent. The court granted the prayer of the bill and found in addition thereto that the taxes due upon the land were a prior lien and must be paid first from the proceeds of the sale and decreed accordingly.

The plaintiff appealed and alleges error in the part of the decree finding that the taxes were a prior lien and ordering them paid first from the proceeds of sale, claiming that there was no allegation in the bill or answer relative to the taxes and that neither the Territory nor the Tax Assessor was a party to the suit and that there was no basis for such finding and decree.

It does not appear from the decree or the record whether the taxes are due from the interest of the mortgagor or mortgagee, or both, as provided for taxing mortgaged property. (Sec. 831, C. L.) It does appear that the Tax Assessor and the Territory of Hawaii were not parties to the suit and not being parties to the litigation, the rights of neither were affected by the decree. The decree authorized the sale of the interest of the mortgagor in the land. The lien on the land given for taxes (Sec. 822, C. L.) could not be changed or barred by the proceedings wherein the right of this lien was in no way litigated. The decree and sale thereunder could only affect the parties before the court.

It was said by this court that, "Our statute makes no difference between real and personal property in respect to the charge of the tax being upon the owner, at the date selected for the falling of the tax, * * * although the payment of the tax upon real estate is secured notwithstanding the sale or transfer of it, by attaching a liability to the real estate itself. The debt of the tax is still upon the owner." *Jones v. Norris*, 8 Haw. 71, 73.

If the plaintiff had wished to clear the land of the lien for taxes due from the mortgagor, assuming that one existed, it could have done so by proper allegations in the bill and proof at the accounting but in the absence of such allegations in the bill or answer the court on the suggestion of the Tax Collector, had no authority to introduce and embody this matter in the decree. *Jones on Mortgages*, Sec. 1597.

The decree must follow the pleadings and cannot go beyond the issue or issues made by them. It was said by the Supreme Court of New York, "The rule is explicit and absolute, that a party must recover in chancery according to the case made by his bill or not at all, '*secundum allegata*' as well as '*probata*'." *Bailey v. Ryder*, 10 N. Y. 363, 370.

The case of *DeLeuw, et al. v. Neely*, (71 Ill. 473) is practically identical with the case at bar in the facts, the decree and the error complained of. In that case the Supreme Court of Illinois reversed the decree and remanded the cause.

The decree appealed from is reversed and the cause remanded for such further proceedings as may be necessary consistent with the foregoing opinion.

Smith & Parsons for plaintiff.

No appearance for defendant.

THE TERRITORY OF HAWAII *v.* AH MOON.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED APRIL 25, 1902.

DECIDED MAY 3, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Failure to notify opposing counsel of the filing of a bill of exceptions, as provided in Circuit Court Rule 15 C, if that Rule is still in force, does not warrant the dismissal of the exceptions in this court.

A transcript of evidence which is not made a part of the bill of exceptions by reference or otherwise and which was not filed in the court below, cannot be considered by this court.

OPINION OF THE COURT BY FREAR, C.J.

Exceptions by defendant in a prosecution for furnishing a poisonous drug, to wit, opium, without a license, under Penal L., Sec. 777.

The prosecution first moved to strike the bill of exceptions from the record on the ground that notice of its presentation in the Circuit Court had not been given, &c., as required by Circuit Court Rule 15 C. Assuming that that Rule is still in force, it is directory and the remedy was by proper motion in the Circuit Court. *Egan v. Brewer*, 9 Haw. 198.

The prosecution next contended that there was nothing before the court under the bill of exceptions. This contention must be sustained. The only exception set forth in the bill is one to the overruling of a motion for a new trial based on the ground that the verdict was contrary to the law and the evidence. But the evidence is not made a part of the bill by reference or otherwise, and indeed, although a transcript of evidence appears among the papers sent up, it was not even filed in the court below. See *Keliilihune v. Vierra*, 13 Haw. 28.

The exceptions are overruled.

Deputy Attorney General J. W. Cathcart for prosecution.

Fitch & Thompson and *W. S. Wise* for defendant.

IN RE ESTATE OF KALUA KAPUKINI, a Spendthrift.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED APRIL 24, 1902.

DECIDED MAY 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A circuit judge sitting in probate rendered a decree terminating a spendthrift trust and discharging the guardian on the ground that the same was no longer necessary. It was made to appear, on appeal, that on the same day the decree was entered the ward executed a trust deed conveying her entire estate to a trustee and directing that one-fifth of the amount thereof be paid to one of her attorneys as a fee. *Held*, that such trust deed may be considered, when properly presented, by the appellate court and that in this case the deed, together with the other evidence, shows conclusively that the decree appealed from is erroneous.

OPINION OF THE COURT BY GALBRAITH, J.

Kalua Kapukini filed her petition in the probate court of the First Circuit setting out that on February 24, 1894, she had been adjudged a spendthrift under the statute and that J. A. Magoon had been appointed and qualified and had since acted as the guardian of her estate; that the facts or claim on which she had been adjudged a spendthrift no longer existed; that she was now capable of managing her own business affairs, and praying that the spendthrift trust be determined and the guardian discharged. The guardian appeared and answered, and contested the application.

Numerous witnesses were examined for and against the petition. The judge found for the petitioner and ordered the guardian discharged. In the decree signed and entered it is found that the "allegations of the petition are true and that the guardianship of J. Alfred Magoon of the estate and property of the said Kalua Kapukini is no longer necessary. The guardian is ordered discharged, the spendthrift trust is terminated. It is also ordered that the attorney for the petitioner, Geo. A. Davis, Esq., be paid out of the estate and the property of the petitioner the sum of \$250.00 for his counsel fee and for services rendered. Also that J. Alfred Magoon, Esq., be allowed the sum of \$250.00 as counsel fee and for services rendered to be paid out of the estate of the petitioner."

From this decree the guardian appealed.

An examination of the transcript of the testimony shows that there was much conflict in the evidence, and considering this alone I might be inclined to agree with the conclusion of the judge of probate. This appeal is considered on the record (Sections 1434 and 1518, Civ. L.) There is no statute or rule of court defining what shall constitute the record on appeal, but the proceedings in this court are in the nature of a trial *de novo*. *Spreckels v. Giffard*, 10 Haw. 378-383.

With the record in this court, whether a part of it or not is in dispute, is a certain trust deed that was not before the court

below at the time of the filing and entry of the decree. On the 11th day of October, the attorneys for the petitioner filed in the probate court in this proceeding a paper entitled in this cause and endorsed "Demand for Compliance with Decree and Notice." Attached to this paper are Exhibits "A" and "B", one a copy of the decree rendered in this cause and the other a copy of a trust deed executed by Kalua Kapukini and her husband Kalaulaula. The decree was filed October 7, 1901, at 3:10 o'clock p. m. The deed, as appears from the endorsement thereon, was acknowledged on the same day at 4:30 o'clock p. m. By this trust deed Kalua in consideration of one dollar, the receipt of which is acknowledged, conveys to William S. Fleming, as trustee, all of her property, real, personal and mixed. The said trustee is authorized to collect all rents and money due her and to sell and dispose of any or all of the said property or as much thereof as may be necessary to carry out the provisions of the trust, which are (1) to pay the several parties the sums to which they are entitled under the decree rendered as aforesaid; (2) to pay to Thomas Fitch all money that he has advanced or may advance to Kalua; (3) to pay said Thomas Fitch twenty per cent. of the gross value of all the property, real and personal, that has been released to her by virtue of the decree appealed from terminating the spendthrift trust, etc., and to pay to the trustee one per cent. commission on the gross value of the property conveyed by the trust deed, and the further direction on behalf of the trustee to convey to Kalua or to the person she may designate the remainder of her property.

At the hearing in this court the guardian offered proof of the execution of this trust deed under Sec. 1454, C. L., which is in part as follows: "Every such appeal shall be taken on the record and no new evidence shall be introduced in the Appellate Court; provided that the Appellate Court may, in case evidence is offered, which is clearly newly discovered evidence, and material to the just decision of the appeal, admit the same."

It is not material to determine whether the trust deed is a part of the record—although it comes up with the files in the cause properly endorsed and was made such by the motion of the

ward—or should be admitted in evidence on appeal under the statute—it being material and pertinent evidence such that if it had been before the court below might have changed the decree rendered and is of such a character that it would support a bill for review in chancery—for the reason that it is clear, on general principles, if not under the express provision of the statute, that we ought not to close our eyes to the fact established by this evidence and disregard its weight in determining the issue presented on this appeal. *Traphagen v. Voorhees*, 45 N. J. Eq. 41.

There can be little doubt that if this deed, had been made the basis of a motion to the court below to vacate or set aside the decree, it ought to have been granted. It is evidence pertinent to the issue and within the terms of the statute authorizing additional evidence on appeal. It is newly discovered, for it was not in existence at the time of the hearing below, and is material to a just decision of the appeal. The decree was based on the finding that the guardianship of the petitioner was no longer necessary. This deed certainly throws light on the correctness of that finding. We conclude that the deed ought to be considered on this appeal and that our decision may be based upon it.

This trust deed is an eloquent witness against the petitioner. It is a confession on the part of Kalua, if not a conclusive demonstration of error in the finding of the trial judge, i. e. that the guardianship of Kalua's property was no longer necessary. The evening of the day that she is found competent to manage and control her own property, and within two hours after the decree is filed, she conveys all of her estate to a trustee and gives one-fifth of the gross amount thereof to one of her attorneys as a fee. This trust deed and its generous distribution of the ward's inheritance is not a pleasant subject of contemplation in connection with the estate of one who for years past has been under the protection of the court.

The appeal is sustained and the decree reversed and the cause is remanded to the Probate Court with direction to dis-

miss the petition and for such further proceedings as may be necessary.

Thomas Fitch and *Geo. A. Davis* for petitioner.

J. Alfred Magoon, guardian, in person.

CONCURRING OPINION OF FREAR, C.J.

I think that the deed is admissible in evidence in this court under the statute and that it adds much to the weight of the other evidence, but that the other evidence is sufficient without the deed to call for a reversal of the decree appealed from. As to fees, the question of the amount alone was submitted to us and that without argument. Mr. Davis appears to have received already from his client sufficient for the part taken by him in the case. Mr. Magoon's fee should be cut down to \$100 under the circumstances.

CONCURRING OPINION OF PERRY, J.

I concur in the conclusion that the decree terminating the guardianship should be reversed, but base such concurrence solely on the ground that the evidence adduced at the trial does not show either that the ward has reformed in respect to her habits as to excessive drinking or that the guardianship is no longer necessary. The trust deed executed almost immediately after the rendition of the decree appealed from, and referred to in the foregoing opinions, if it is evidence proper to be considered or admissible on this appeal, is strong and convincing evidence tending to show that a continuance of the guardianship is necessary.

On the subject of fees I concur with the Chief Justice.

CHARLES H. FAIRER, Trustee of the Estate of K. Tomishima, a Bankrupt, v. H. HACKFELD & CO., Limited.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED MARCH 6, 1902.

DECIDED MAY 15, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under the Bankruptcy Act of 1898 (30 U. S. Stat. at L. 544) it is one of the essentials of a voidable preference that the person receiving it or his agent shall, at the time of its receipt, have had reasonable cause to believe that it was intended thereby to give a preference and this necessarily includes reasonable cause to believe that the debtor was at the time insolvent.

Upon the evidence in this case, held that it is not satisfactorily shown that the alleged preferred creditor had at the time of the transfer, reasonable cause to believe that the debtor was insolvent.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity brought by a trustee in bankruptcy against a creditor, praying that three certain transfers of property to the creditor be declared void, on the ground that such transfers were voidable preferences within the meaning of the bankruptcy Act of 1898.

One Tomishima, a resident of Olaa, Hawaii, was on the petition of certain creditors filed March 11, 1901, adjudged a bankrupt on June 3, 1901. Tomishima had conducted a retail merchandise store at Olaa and similar stores at one or two other places on Hawaii and was also engaged as a contractor in clearing land for planters and building railroads. He had dealt with Hackfeld & Co., the respondent, purchasing considerable

quantities of goods, most of which were for his Olaa store. He kept a running account with the respondent, from time to time paying to it substantial sums of money. Credit had been freely extended to him by the corporation. On December 4, 1900, the sum of \$9,421.06 being then due, Tomishima executed to Hackfeld & Co., at its request, a promissory note payable December 31, 1900, for that amount and also a mortgage to secure payment thereof, the property covered by the mortgage being the stock of goods and the building at Olaa, certain leaseholds and buildings at Waiakea, twelve horses, four mules and certain wagons. Other property of his, to wit, promissory notes of the face value in all of \$2,000, the stock of goods in the store at Waiakea, a note for \$1,000 secured by a mortgage, a building on the Shipman tract at Olaa and an interest in certain cane growing contracts, was not included in the mortgage. Thereafter, and until the middle of December, the corporation sold to him goods on credit to the amount of \$686.59, an understanding being first had with Tomishima that he should pay cash for all rice purchased by him. About the middle of December, Tomishima having failed to keep his agreement as to the cash payments, Hackfeld & Co. declined to sell to him any more goods on credit. On December 30, 1900, he assigned to the respondent, as further security for the debt, a certain promissory note for \$1,000 due him by others and also a mortgage of growing crops given him to secure its payment. On or about January 26, 1901, Hackfeld & Co.'s agent, hearing that Tomishima was selling goods at Olaa at very low rates, investigated the matter and found that the stock of goods had been very greatly diminished and for the company's protection took possession, foreclosed the mortgage and later sold the mortgaged property at auction, realizing therefrom the sum of \$2,116.24, net proceeds, which sum the respondent still holds. On March 21, 1901, Hackfeld & Co. received from one McStocker, as guarantor on Tomishima's note of December 4, 1900, the sum of \$394.72, that being the extent of McStocker's guaranty.

The question is whether any one or all of these three trans-

fers were, under the statute, voidable preferences. The Circuit Judge held that they were not and dismissed the bill. The complainant appealed.

What is a preference is defined in section 60 (a) of the Act. "A person shall be deemed to have given a preference, if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Section 1, subdivision 15, provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 60 (b) also is applicable in this case. It reads: "If a bankrupt shall have given a preference within 4 months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference it shall be voidable by the trustee, and he may recover the property or its value from such person."

Not all preferences, then, are voidable. Those only are in which the following five essential elements exist, namely: (1) a transfer, (2) within four months before the filing of the petition or after the filing of the petition and before the adjudication, (3) insolvency of the debtor, (4) the effect of the transfer must be to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class, and (5) the creditor to whom the transfer is made must have had reasonable cause to believe that it was intended thereby to give a preference.

Referring first to the execution of the mortgage of December 4, 1900, the facts of the transfer and of its making within the time stated in the statute is admitted. It may be assumed for the purposes of this case that on December 4, 1900, Tomishima was in fact insolvent and that the effect of the transfer was to

enable Hackfeld & Co. to obtain a greater percentage of its debt than any other of the creditors. The fifth element still remains to be considered. Did Hackfeld & Co., or its agents, at the time of the execution of the mortgage, have reasonable cause to believe that Tomishima intended thereby to give a preference? This includes necessarily the question of whether or not at that time they had reasonable cause to believe that Tomishima was insolvent, for insolvency is one of the essentials of a preference. Loveland on Bankruptcy, pp. 467-468. We may say, at this point, that we are satisfied from the evidence that at the time in question the respondent did not know or believe that Tomishima was insolvent.

On the subject of reasonable cause the law is clearly established. "The resultant of all these decisions we take to be this: that the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or believe in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent."—*In re Eggert*, 102 Fed. 742 (1900).

"Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business," (or, under the Act of 1898, that his assets are not equal in value to the amount of his debts).—*Wager v. Hall*, 16 Wall. 584, 600 (1872).

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. * * * A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be

wanting. Obtaining additional security, or receiving payment of a debt under such circumstances, is not prohibited by the law."—*Grant v. National Bank*, 97 U. S. 81 (1877). It is to be noted that this was even under the Act of 1867, when inability to pay one's debts as they matured constituted insolvency.

For a case under the Act of 1898 see *In re Eggert, supra*, where it was said: "Indeed it may be said that a majority of merchants absolutely solvent, in the sense in which the term is employed in the bankrupt act, are not at all times able to promptly meet their obligations as they mature. To hold that a creditor receiving payment of or security for a past due debt is, by the mere fact of knowledge that the debt is past maturity, put upon inquiry of his debtor's inability to pay all his debts, and that under such circumstances he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive." See also *Buchanan v. Smith*, 16 Wall. 277 (1872); *Bank v. Cook*, 95 U. S. 343 (1877).

The evidence shows that the respondent's agents before taking the mortgage inquired of Tomishima concerning his assets and liabilities and that in reply he represented to them that his stock of goods at the Olaa store was of the value of about \$14000, that he had other property enumerating the items and their values, aggregating about \$6000 more, and that he owed in all, including his debt to Hackfeld & Co., about \$12000. Tomishima appeared to be doing a good business at Olaa. A short time prior to the execution of the mortgage Hackfeld's agent had been in the store and had seen the stock of goods though he made no examination of them; he believed, as he testifies, Tomishima's statement as to the value of his stock. Shortly before December 4, 1900, Tomishima's debt to Hackfeld & Co. had been about \$12000 and that for goods that had gone almost entirely into the Olaa stock. Moreover Tomishima was interested in cane-growing contracts in which as he represented, he had invested about \$2500 and from which he hoped for

future profits, although, as he himself stated, no returns could be expected from that source at the time.

There was some evidence tending to support the complainant's claim in the suit, as also some evidence other than that already referred to herein tending to support the respondent's contentions. Upon some points, as, for example, the actual value of some of the items of property not included in the mortgage of December 4, 1900, the evidence is not as full and satisfactory as might be desired. Without attempting, however, to review in detail all the circumstances and evidence throwing light for or against the theory of the existence of reasonable cause to believe, we find upon all the evidence that it has not been satisfactorily shown that the respondent or its agents did, on December 4, 1900, have reasonable cause to believe that Tomishima was insolvent. With respect to the assignment of December 30, 1900, our finding is the same. The only additional circumstance that there is on this point is that about the middle of December the respondent had ceased to give credit to Tomishima. That however, as appears from the authorities above quoted, is not inconsistent with the absence of reasonable cause to believe.

As to the payment of \$394.72, the evidence is very meagre. It does not appear that this sum was paid upon an order of Tomishima's or that it was a payment of a debt owing by the guarantor to Tomishima or that the guarantor was reimbursed out of the estate of Tomishima or that said estate was diminished because of such payment. The evidence shows merely a guaranty to pay the sum stated. If the payment had not been made the trustee could not, so far as the case presented by the evidence is concerned, obtain that sum of money from the guarantor. The guaranty was in favor of the defendant alone and no one else could take advantage of it. The amount is not recoverable by the trustee. See Lowell on Bkrptcy, Sec. 75, page 59; *Winsor v. Kendall*, 3 Story 507 (20 Fed. Cases, No. 17786).

It is contended by the complainant that the decree appealed from should be reversed for failure of the Circuit Judge to make

specific findings on all the questions of fact argued by counsel in the case. As we understand the decision upon which the decree was based, the judge did find, although he did not express it in these exact words, that the creditor did not have reasonable cause to believe that Tomishima was insolvent at the time of the transfer. In view of that finding, it was unnecessary for the judge below, as, in view of our conclusion on the same point, it is unnecessary for us now, to make findings upon the other branches of the case. Whether or not under other circumstances a decree in equity would be reversed for failure of the Circuit Judge to make specific findings, we need not now say.

The decree appealed from is affirmed.

Smith & Parsons for complainant.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for respondent.

GEO. U. HIND, C. A. SPRECKELS, RUDOLPH SPRECKELS, G. WEMPE, WILLIAM CARSON, H. D. BENDIXEN, JAS. H. NELSON, M. C. SIVERSON, F. O. JOHANSEN, GEO. A. NELSON, M. J. McLEOD, G. M. FAGERLUND, J. S. HELLINGSEN, JOHN PILTZ and HENRY M. WETHERBEE v. WILDER'S STEAMSHIP COMPANY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 10, 1902.

DECIDED MAY 29, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Scmble, that one Circuit Judge may sign a decree in conformity with an opinion filed by another judge of the same circuit who has gone out of office.

Semble, that a void decree is appealable.

If the Supreme Court entertains without objection an appeal from a decree signed without objection by one Circuit Judge upon the decision of another, its decree cannot afterwards be set aside on motion as void, assuming that the decree appealed from was improperly signed by a different judge from the one who heard the case.

A statute is not repealed though expressed to be repealed by a later statute, if the latter is void.

There cannot be a *de facto* officer unless there is a *de jure* office.

If there is a *de jure* office, there may be a *de facto* officer however invalid his appointment.

There may be a *de facto* officer even though the office is already filled by a *de jure* officer, if the latter is not in possession of the office.

There are not two offices in the case of each Circuit Judge—that of Circuit Court and that of Circuit Judge in Chambers. There is but one office, that of Circuit Judge, though certain of his powers are exercised in Circuit Court and others in Chambers.

Acts 23 and 67 of the laws of 1898, the latter purporting to repeal the former, each provided for the appointment by the President of the Republic, without the consent of the Senate, of a person to perform the duties of a Circuit Judge during the latter's temporary disability or absence. The President appointed certain persons to act in the places of the First and Second Circuit Judges of the First Circuit during the latter's illness. The special judges performed the duties of the offices with the acquiescence of all concerned during the illness of the regular judges. One of the special judges heard a case in admiralty and filed his decision. The other signed a decree in conformity with that decision. The case was appealed and a decree entered in the Supreme Court slightly modifying that of the lower court. Five terms afterwards a motion was made to set aside the decree of the Supreme Court on the ground that the decision and decree of the special judges were void. Held,

Assuming that Acts 23 and 67 were unconstitutional because the appointments therein provided for were not to be made with the approval of the Senate, that decrees absolutely void may be set aside at terms subsequent to those at which they are rendered, and that the consent of the parties cannot invest persons with judicial power, still the special judges were judges *de facto* and their decrees cannot be thus attacked collaterally.

The result would be the same if, assuming those Acts to have been valid before the annexation of these islands to the United States, they were rendered invalid by the Joint Resolution of annexation (after which the appointments were made and decrees rendered), and if such power of appointment as the President of Hawaii had before annexation was not continued in him afterwards either by the Joint Resolution or by the direction of the President of the United States, although in our opinion such power was so continued in him.

Semble, that color of appointment or of authority to appoint is not necessary to constitute one a *de facto* officer.

OPINION OF THE COURT BY FREAR, C.J.

This is a motion by the libellee to vacate a decree in admiralty entered in this court five terms ago. A Circuit Judge after a hearing of the case on its merits rendered a decree for the libellants. The case was appealed to this court which also entered a decree for the libellants slightly modifying the decree appealed from. 13 Haw. 112, 174. This court declined to allow an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. *Id.* 174. That court also declined to allow such appeal. 108 Fed. R. 113. The Supreme Court of the United States declined to compel that court to entertain such appeal. *Wilder's S. S. Co.*, 22 Sup. Ct. Rep. 225. In two other suits in admiralty, against the same libellee, arising out of the same collision, heard for the most part upon the same evidence, in the District Court of the United States for Hawaii, a decree was rendered for the libellants and affirmed on appeal by the United States Circuit Court of Appeals for the Ninth Circuit. *Wilder's S. S. Co. v Lou*, 112 Fed. R. 161.

The libellee now moves this court to set aside its decree on nine grounds.

The first four of these—which raise the question of the admiralty jurisdiction of the Circuit Judges and of this court respectively as to suits begun after the annexation of these islands to the United States but before the Organic Act took effect—are now abandoned in view of the above mentioned

decisions of the United States Supreme Court and the Circuit Court of Appeals.

The ninth ground, which is the general one that the decree is null and void, raises no questions that are not raised by the others.

The seventh ground (not very much relied on) is that the decree of the Circuit Judge appealed from was void because it was signed by a different judge from the one who heard the cause and filed the opinion. The judge who heard the cause and filed the opinion had gone out of office and another judge of the same circuit then signed the decree. The decree was not questioned as to its validity in this respect in the court below but on the contrary was indorsed "approved as to form" by counsel for the libellee. Nor was the question suggested in this court on the appeal. It is not disputed now that the decree conformed to the opinion.

The question whether a bill of exceptions may be settled and allowed by a successor in office to the judge who tried the case has often arisen and is one in regard to which there is much difference of opinion, but the question as to whether a decree drawn in conformity with an opinion of one judge may be signed by another judge has seldom arisen. The case which, so far as our observation has gone, comes nearest to the present case, *Ruckman v. Decker*, 27 N. J. Eq. 244, strongly supports the view that a judge may sign a decree in conformity with an opinion filed by his predecessor in office. But it is unnecessary for us to definitely decide that question. In our opinion the signing of the decree by another judge, if an error at all, was one that it is now too late for the libellee to take advantage of under the circumstances. The decree now in question is the decree of this court, not that of the Circuit Judge. The jurisdiction of this court to enter such a decree in such a case is unquestioned. The decree of this court can be set aside, if at all, on this ground only on the theory that this court was without jurisdiction to entertain the appeal from the decree of the Circuit Judge because that decree was void.

There is much difference of opinion as to whether a void decree is appealable or not, with, perhaps, the weight of authority in favor of the view that it is appealable. But, however that may be, assuming that the Circuit Judge who heard the case and filed the opinion had jurisdiction, the libellee cannot now have the decree of this court set aside on the ground that the decree appealed from was signed by a different judge. This court was not wholly without jurisdiction to entertain the appeal in such a sense as to render its decree void. In a certain sense an appellate court is without jurisdiction to entertain an appeal whenever the statutory requirements of an appeal have not been complied with, as when a proper appeal bond has not been filed, or costs have not been paid, &c., but such non-compliance cannot be taken advantage of after the case has been heard and determined by the appellate court. So in a certain sense the appellate court would not, in the absence of statutory authority, have jurisdiction to entertain an appeal from an interlocutory order or decree or from a mere opinion as distinguished from the final decree, and yet, if it did entertain such an appeal without the question being raised, its decree could not be set aside or questioned afterwards on that ground. The decree on appeal in this case is no more assailable now than it would be if the appeal had been taken from the decision of the judge who heard the case instead of from the decree of the other judge or if it had been taken from an interlocutory order or if it had not been taken within the time prescribed by the statute. See *Washington Bridge Co. v. Stewart*, 3 How. 413; *Coleman v. Coleman*, 5 Haw. 300; *Barthrop v. Kona Coffee Co.*, 10 Haw. 398; *Spooner v. Rice*, 11 Haw. 427; *Estate of Kamakala*, 12 Haw. 262; *Un Wo Sang Co. v. Alo*, 7 Haw. 673.

The remaining three grounds on which the motion is based are to the effect that neither the judge who heard the case nor the judge who signed the decree had jurisdiction in the matter—for the reason that each was acting as a special judge in the place of a regular judge under an appointment made under

a void statute. The arguments and briefs upon this point are very elaborate and refer to a large number of cases. It will not be necessary for us to consider at length all the points raised.

The appointments were made, the cause heard; the decree signed, and the appeal to this court taken before the establishment of the Territorial government although after the annexation of these islands to the United States. We shall consider the question first with reference to the Constitution and laws of Hawaii unaffected by annexation.

The Constitution of the Republic (1894) provided (Art. 26, Sec. 1) that, "The President, with the approval of the Senate, shall appoint * * * the Judges of the Supreme and Circuit Courts * * *," and (Art. 26, Sec. 2) that, "In case a vacancy in any such office shall occur while the Senate is not in session, the President may fill such vacancy by granting a commission which shall, unless confirmed, expire at the end of the next session of the Senate," and (Art. 82) that, "The Judicial Power of the Republic shall be vested in one Supreme Court, and in such Inferior Courts as the Legislature may, from time to time establish," and (Art. 84) that, "The Judicial Power shall be divided among the Supreme Court, the Justices thereof, and the several Inferior Courts of the Republic in such manner as the Legislature may, from time to time, prescribe; and the tenure of office of the Judges of the Inferior Courts shall be such as may be fixed by the law creating them." The legislature created five Circuit Courts by the Judiciary Act of 1892 (Civ. L. Sec. 1136) and provided in the same Act (Civ. L. Sec. 1137) that, "The Circuit Court of the First Circuit shall consist of two Judges, who shall be styled First and Second Judges respectively of the Circuit Court of the First Circuit, either of whom may hold the court." The same Act defined the jurisdiction of the Circuit Courts (Civ. L. Sec. 1144) and of the Circuit Judges in Chambers (Civ. L. Sec. 1145) respectively. By Act 67 of 1898 it was provided that, "In case of the temporary disability or absence from the country of any Circuit Judge, some other person may be appointed by the President to perform the duties of the office while such disability or ab-

sence continues. The commission of every such person so appointed may be revoked at any time by the President at his discretion." This Act is in the same language as Act 23 of the same session and was passed because of a slight error in the title of Act 23. If it is void because not approved until the day (July 7, 1898) on which the Joint Resolution of Annexation was approved by the President of the United States although five weeks before the actual transfer of sovereignty (August 12, 1898) the prior Act (23) although in terms repealed by the later (67) would, we presume, remain in force if otherwise valid. Purporting to act under the authority of one of these statutes the President of the Republic on the 9th of March, 1900, appointed R. D. Silliman Acting Second Circuit Judge of the First Circuit, and on the 7th of May following appointed Geo. A. Davis Acting First Judge of the same circuit. In each instance the appointment was made because of the temporary disability, through illness, of the regular judge. Judge Silliman acted as Second Judge until May 3, 1900; Judge Davis, as First Judge until June 4, 1900, the day on which the Organic Act took effect. Judge Silliman after a hearing decided the case, May 1, 1900, two days before he went out of office. Judge Davis signed the decree on the day of his appointment.

We will assume for the purposes of this case that, although courts cannot as a rule set aside their judgments or decrees after the term at which they are rendered, they may do so in cases of absolutely void judgments or decrees; also that consent, shown either by acquiescence or by the filing of a written stipulation that the special judge might hear the case, as was done here, could not invest one with judicial power; also that there was no vacancy in the office of either the First or the Second Judge such as could be filled during the period in question by the action of the President alone without the approval of the Senate under Article 26, Section 2, of the Constitution; also that the act of the special judges in question may be attacked collaterally if those judges were mere intruders and not at least *de facto* judges. It is conceded that if they were *de facto* judges their acts must be upheld in this case as those of *de jure* judges. We

will assume also that Acts 23 and 67 were unconstitutional for the reason that the appointments therein provided for were to be made by the President alone without the approval of the Senate, although there are decisions by a number of State courts which seem to support the opposite view, even when the courts in question are constitutional courts, and still others that, although not supporting that view when the courts are constitutional courts, support it when, as was perhaps the case with the Circuit Courts here at the time in question, the courts are legislative courts. (At present under the Organic Act, Sec. 81, the Circuit Courts may, perhaps, be regarded as constitutional courts, and the Circuit Judges are appointed by the President of the United States with the advice and consent of the Senate, under section 80 of the Organic Act.)

It is conceded that if there were offices to be filled, the special judges would be *de facto* officers, notwithstanding the unconstitutionality of Acts 23 and 67 under one of which the appointments were made, if those Acts provided for appointments only; in other words, that there may be a *de facto* officer, however invalid his appointment, if there is a *de jure* office to be filled, but it is contended and we think that the contention is sound, that there cannot be a *de facto* officer unless there is a *de jure* office. There cannot be *de facto* office. If the office does not exist except as created by the Acts in question, it cannot exist at all, even *de facto*, if the Act is unconstitutional, for an unconstitutional act is absolutely void and of no effect. But if the office exists *de jure*, its duties may, on grounds of public policy, be performed by a *de facto* officer.

It is argued that past legislation and judicial decisions show conclusively that there are two classes of courts in the various circuits, namely, Circuit Courts and Circuit Judges in Chambers; that consequently there are two distinct offices,—that of Circuit Court and that of Circuit Judge in Chambers; that in the circuit in question the two offices of the Circuit Court were filled by the two regular Circuit Judges respectively, and the two offices of Circuit Judge in Chambers were also filled by the same two regular Circuit Judges; and therefore that, if the

special judges in question could have been appointed at all, it must have been because two new offices were created for them to fill, but that no new offices were created by Act 23 or Act 67; since those Acts provided for appointments only.

We agree with counsel that the intention was merely to provide for the appointment of persons to temporarily occupy the offices already created by law and not to create new offices, either of the same or different grade.

But in our opinion there were not for the purposes of this case two distinct classes of offices or two distinct offices in the case of each judge—those of the Circuit Court and those of the Circuit Judges in Chambers. It is true, the jurisdiction of Circuit Courts and of Circuit Judges in Chambers is distinct and clearly defined, and for certain purposes or in certain senses the Circuit Courts and the Circuit Judges in Chambers may be regarded as distinct courts,—and for that matter there may be a further subdivision of the Circuit Courts into civil, criminal, divorce, &c., courts, and of the Circuit Judges in Chambers into equity, probate, &c., courts, and as the Circuit Judges perform various other than strictly judicial functions, they may perhaps in a certain sense be said to hold various other offices. But for the purposes of the present case there was but one office in the case of each judge—that of Circuit Judge or, more formally speaking, that of the First and that of the Second Judge of the Circuit Court of the First Circuit. The Constitution spoke only of Judges of the Circuit Courts. Art. 26, Sec. 1. The statute likewise, in the sections referring to the Circuit Courts and the Circuit Judges in Chambers, speaks only of Judges of the Circuit Courts. A person is not appointed Circuit Court or Circuit Judge in Chambers. He is appointed Circuit Judge, and then his powers and duties and the times and conditions under which he may exercise or perform them are defined. He exercises certain powers or jurisdiction when sitting in Circuit Court and others when sitting in Chambers. Although there was nothing in the Constitution or statutes expressly requiring or permitting the same person to be appointed to both the alleged office of Circuit Court and that of Circuit

Judge in Chambers, still, different persons could not have been appointed to those two alleged offices—for the reason that they did not exist. There was only one office—that of Circuit Judge.

But does it make any difference whether there were two classes of offices or not? In either case, the office could be filled by a *de jure* or a *de facto* officer. The question of importance is whether there could be a *de facto* and a *de jure* officer at the same time, that is, whether, in the proposition that there can not be a *de facto* officer without a *de jure* office to be filled, the emphasis is on the words "*de jure office*" or on the words "to be filled." It would seem on principle that, if there is a *de jure* office there may be a *de facto* officer when the invalidity of his appointment is due to the fact that some one else has been properly appointed as well as when it is due to the fact that he himself has been improperly appointed; and the authorities seem to support this view. Not, indeed, that the office may be actually occupied and its duties performed at the same time by both a *de jure* officer and a *de facto* officer, but that a *de facto* officer may be in possession of the office while a *de jure* officer is in existence though not in possession of the office, as was the case here.

When referring to the authorities let us bear in mind that the question of the validity of the appointment of these special judges or the question of their authority to act was not raised in this case or in any other case until by the present motion filed more than a year and a half after this case was heard and decided by those judges; that they acted as Circuit Judges in the undisturbed possession of their offices both in the Circuit Court and in Chambers during their whole terms, trying many cases; that the validity of the statutes under which they were appointed had never, so far as appears, been openly questioned; and that during the periods now in question the regular judges did not attempt to act but on the contrary acquiesced in the actions of the special judges. Although the regular judges had the titles to the offices they were not in possession of the offices. The special judges alone were in possession and their right to perform the duties of the offices was acquiesced in by every one.

The case relied on most by the movant is that of *Norton v. Shelby County*, 118 U. S. 425. That case may easily be distinguished from this. There the legislature of Tennessee had attempted to create an entirely new body, a board of commissioners, and to confer upon it the powers which under the constitution belonged solely to what was called the county court, which was composed of the justices of the peace acting collectively. Not only did the statute purport to create the new offices as well as provide for the appointment of the officers but the justices of the peace continued in office claiming the exclusive right to exercise the powers in question and immediately brought direct proceedings to enjoin the commissioners from acting, pending which proceedings the action of the commissioners which was called in question was taken. The Supreme Court of the United States followed the decision of the Supreme Court of the State in holding that there were no *de jure* offices and that therefore the commissioners were not *de facto* officers. The Court went on to say that, "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions." The court proceeded to refer with approval to three other cases very analogous to the case now before us, in each of which an officer had been appointed under an act of the legislature in a manner contrary to the constitution, to act in the place of an absent or ill regular officer, and in each of which the office was already filled by a regular officer, and in each of which the special officer was held to be a *de facto* officer. The court said:

"The case of *The State v. Carroll*, 38 Conn. 449, decided by the Supreme Court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a landmark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. The case was this: The constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace

to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto*, and, as such, his acts were valid. The opinion of Chief Justice Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases that the officer must act under color of authority conferred by a person having power, or *prima facie* power to appoint or elect in the particular case; and it thus defines an officer *de facto*:

‘An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised:

‘First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

‘Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond or the like.

‘Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.

‘Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.

“Of the great number of cases cited by the Chief Justice none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the Chief Justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made. One of them,

Taylor v. Skrine, 3 Brevard, 516, arose in South Carolina in 1815. By an act of that State of 1799, the governor was authorized to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick, or become unable to hold the court in his circuit. A presiding judge of the court was thus appointed by the governor. Subsequently the act was declared to be unconstitutional, and the question arose whether the acts of the judge were necessarily void. It was held that he was a judge *de facto* and acting under color of legal authority, and that as such his acts were valid. Here the judge was appointed to fill an existing office, the duties of which the legal incumbent was temporarily incapable of discharging. Another case is *Cooke v. Halsey*, in 16 Pet. 71. It there appeared that, by the constitution of Mississippi, the judges and clerks of probate were elected by the people. The legislature provided by law that, in case of the disability of the clerk, the court might appoint one. An elected clerk having left the State for an indefinite period, the judge appointed another to serve during his absence. The law authorizing the appointment was declared unconstitutional, but the acts of the clerk were deemed valid as those of an officer *de facto*. Here the office was an existing one created by law."

To the same effect see *Ex parte Strang*, 21 Oh. St. 610, in which a judge appointed during the illness of the regular judge under an unconstitutional statute was held to be a *de facto* judge. See also *State v. Lavik*, 83 N. W. (Neb.) 914.

In *Walcott v. Wells*, 21 Nev. 47, there was one court with three judges. The legislature provided for an additional judge and authorized the governor to appoint him until the next general election. Chief Justice Hawley, now United States District Judge, in a careful opinion reviewed most of the cases referred to above and other cases and held that, conceding the act to be unconstitutional, the judge was nevertheless a *de facto* judge. He used the following besides other language pertinent to the contention of counsel in the present case: "But petitioner contends that respondent is not a *de facto* officer, that the conditions necessary to constitute such an officer do not exist, that there is no office to be filled, that it is a legal impossibility for a fourth judge to fill the office of district judge, 'because the office has

always been full,' and that for these reasons the rule above stated has no application to this case. We admit that there can be no officer, either *de jure* or *de facto*, if there be no office to fill; that an office attempted to be created by an unconstitutional law has no legal existence, is without any validity, and that any persons attempting to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts would be absolutely null and void, and could be questioned by any private suitor, in any kind of an action or proceeding." But "the case comes clearly within the principle of law as stated in the three cases (the Connecticut, South Carolina and Ohio Cases) above quoted from or referred to. In those cases the office was full. There was no vacancy. The law authorizing the appointment of a temporary judge had either been declared unconstitutional, or, for the purpose of the decisions, admitted to be unconstitutional. The temporary judge acted in the place of the judge *de jure*, under color of authority derived from an unconstitutional statute by virtue of his commission, etc. Here the respondent did not take the place of either of the three other judges, for there was no separate place for either to fill, except by the assignment of the presiding judge * * *. He acted as a district judge, filled the office, and presided in court, under as much color of authority as either of the temporary judges in the cases referred to. Why should not the same shield of protection to the public be given to his acts?"

On this branch of the case it remains only to consider whether we are not bound to hold the other way by a former decision of this court rendered in the case of *Regina v. Poor*, 8 Haw. 521. An indictment for embezzlement was presented by one claiming to act as Attorney-General *ad interim*. The defendant immediately moved to quash the indictment on the ground that it was presented by an officer not known to the law and having no legal or constitutional authority to present the same. The question was reserved for the consideration of the full court, which thereupon decided that the Queen could not constitutionally appoint an Attorney-General *ad interim* and granted the motion

to quash. We need not set forth all the circumstances under which that decision was rendered, some of which appear from the decision itself and others of which do not. Nor need we decide whether that case is distinguishable from this on principle considering its facts, which differ considerably from those in this case, or the time or manner in which the question was raised. It is sufficient to say that the court did not consider the question whether the officer was a *de facto* officer nor was that question suggested to the court, so far as appears. The court considered merely whether the officer was one *de jure* or not. If it can be said that the court decided that he was not an officer *de facto*, it can be merely on the theory that that finding is involved by way of inference in the ultimate conclusion of the court. Under such circumstances we cannot regard the decision as obliging us to decide the present case contrary to correct principle and the great weight of authority in other jurisdictions.

Finally, what was the effect of annexation so far as this case is concerned? The Joint Resolution of Annexation (July 7, 1898), provided that, "The municipal legislation of the Hawaiian Islands * * * not inconsistent with this joint resolution * * * shall remain in force until the Congress of the United States shall otherwise determine," and that, "Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such a manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned." In the exercise of the power thus conferred upon him, the President (July 8, 1898) directed that, "the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies." Afterwards to the question, "Should not vacancies occurring in the offices of Hawaiian Government officials, by expiration of term, death or resignation, be filled by

appointment as provided by the laws of Hawaii?" propounded by the Hawaiian Government, the Secretary of State replied by telegram: "Vacancies in appointive office will as a rule be filled as heretofore, but an oath of allegiance to the United States will be required." This last instruction applied to vacancies only and so does not affect the present case except in so far as it tends to show a general intention that the government should proceed without interruption so far as possible under the Hawaiian constitution and laws.

The contention is that the Joint Resolution transferred all power of appointment to the President of the United States and so repealed the Hawaiian constitution and laws in so far as they gave to any one the power to create or fill a judicial office, and that, even conceding that there were vacancies in the present case, and that Act 67 of 1898 was constitutional, there could be no color in the appointment of any one to a judicial office unless the appointment came from the President of the United States. It would seem from the authorities that color of appointment or of authority to appoint is not necessary to constitute one a *de facto* officer, although it may in certain cases add much to other evidence tending to show one to be a *de facto* officer. But aside from that, it is clear that the Joint Resolution continued in force the judicial powers of Circuit Judges and also the President's civil power of appointment, subject to the superior power of the President of the United States in that respect, or at least that the latter's direction that the civil powers exercised by the officers of the existing government in these islands should be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, continued in the President of Hawaii such powers of appointment as he had previously, subject of course to the superior power of the President of the United States. Such direction by the President of the United States was clearly within the power conferred upon him by the Joint Resolution. It does not fall within the doctrine that delegated power cannot be delegated. But after all, what difference does it make that the President of Hawaii lacked the power to make

the appointments in question after annexation if he lacked it also before annexation? In either case he was without the power, and the validity of the acts of the appointees is unassailable now and here, not because the appointments were valid, but because, assuming that the President did not have even color of authority to appoint them, they were nevertheless *de facto* officers in possession of *de jure* offices and performing the functions of those offices and, we may add, with the acquiescence of all concerned in their supposed right to hold those offices and perform those functions.

The motion to vacate the decree is denied.

Smith & Lewis for libellants.

Kinney, Ballou & McClanahan for libellee.

CONCURRING OPINION BY GALBRAITH, J.

I concur in the conclusion announced by the majority of the court, i. e., that the motion ought to be denied. Whatever my opinion might have been on the questions raised by the motion, had it been presented in due season, I do not feel called upon to express it now. Whatever virtue there may be in the libellee's contention, it seems to me that it has no right to urge them at this time or to ask the court to pass upon them in this proceeding. The decree sought to be vacated is the decree of this court rendered, after an exhaustive investigation of the cause on its merits, at the September, 1900, term, and entered on November 13, 1900. An appeal from this decree to the Circuit Court of Appeals, Ninth Circuit, was sought and denied by that court (108 Fed. 113). This action was affirmed by the Supreme Court of the United States (*Wilder's S. S. Co.*, 22 Sup. Ct. R. 225). I do not think that the court ought to entertain the motion at this late day, particularly since all the facts relied on were known to libellee at the original hearing of the case in this court on appeal from the decree of the Judge of the First Circuit. The motion, no matter what it is called, is in reality and effect a petition for a rehearing, presented long after the expiration of the term at

which the decree was rendered and after an effort to appeal had failed. Rule 11 of this court provides that "a petition for rehearing may be presented only within thirty days after the filing of the opinion." The opinion was filed in this court November 7, 1900. The motion was filed January 31, 1902.

The questions raised by the motion and discussed by the majority of the court, however interesting, are, it seems to me, more academic than practical. No reason has been given to justify the inference that if the motion were granted and a new trial ordered, it would or ought to result in a decree differing in any material respect from that sought to be set aside. The facts in this case have been passed upon by four different courts and practically the same conclusion reached by each. Public policy and the interest of justice demand that there should be an end to litigation.

HARVEY R. HITCHCOCK, LAWRENCE H. DEE,
HARRY L. EVANS and CHARLES J. FISHEL, on be-
half of themselves and all other stockholders in the Kamalo
Sugar Company, Limited, v. FRANK HUSTACE, JOHN
J. EGAN, FRANK H. FOSTER and THE KAMALO
SUGAR COMPANY, LIMITED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED APRIL 28, 1902.

DECIDED MAY 31, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A promoter is the fiduciary of the corporation he brings into existence and of those whom he induces to buy its shares. It is his duty to make full and fair disclosure of the facts to the shareholders or subscribers.

Where promoters organize a corporation for the purpose of selling property or options they own, and make an agreement with themselves, as promoters or stockholders, for the company to buy their property or options, at a profit, and do not disclose to the shareholders or subscribers, other than themselves, the terms of said agreement, such failure to disclose is a fraud and the agreement void and the amount of the profit made by the promoters may be recovered, in equity, at the suit of the stockholders, where the proper officers of the corporation refuse to act.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiffs, dissatisfied stockholders in the Kamalo Sugar Company, Limited, filed a bill in equity against the defendants Hustace, Foster and Egan as promoters of said company to recover for the corporation Thirty-five Thousand Dollars in cash and Six Thousand shares of the capital stock of the company or its value, One Hundred Twenty Thousand Dollars, taken by them as *secret profits* or promoters' fees or compensation for floating the plantation. A demand upon the corporation and its officers to bring the suit and a refusal to do so is set out. The other allegations of the bill and answers are given in detail in another opinion rendered in this cause on another occasion (13 Haw. pp. 641 to 648 inclusive). It will not be necessary to repeat them here. Another chapter in the history of the case is written, *ante* pp. 1, 2, 3, 4.

The principal evidence at the hearing was the testimony of the defendants and the records made by them. The Circuit Judge made few specific findings of fact. These are important in the determination of this case, and we deem it advisable to give a summary of the leading facts established by the evidence before attempting to discuss or apply the principles of law involved.

It was proved that Hustace, Egan and Foster were the promoters of the Kamalo Sugar Company, Limited; that Foster held certain options for deeds and leases of land on the Island of Molokai considered desirable as the basis for forming a sugar plantation; that he conferred with Hustace and Egan and the latter

bought a one-half interest in Foster's holdings on the third day of April, 1899; that upon said day the three defendants entered into a written contract which after reciting the purchase of the above interest and the consideration therefor paid, among other stipulations contains the following: "That the purpose of the parties hereto in acquiring said lands, is the formation of a corporation under the laws of this country, to grow sugar cane thereon and to erect, maintain and operate sugar mills, and to that end, said parties of the second part," (Hustace and Egan) "shall at their own expense, within a reasonable time from date hereof duly organize such corporation with such capital stock and in other respects as the parties hereto," (Foster, Hustace and Egan) "may mutually agree. That all of said lands so acquired shall upon the organization of said corporation be sold and conveyed to the same at such price as the parties hereto may mutually agree, and the difference between the price paid for said lands and the price for which the same shall be sold to said corporation shall be divided one-half thereof to said first party," (Foster) "and one-half to the said second parties" (Hustace and Egan).

It was also established that at this period in the history of the Territory there was active expansion in the sugar industry; that many new plantations were started; that there was much speculation in the stocks of these companies and that the public generally were eager to buy and did buy such stocks with the expectation of selling them at a profit; that the public including the plaintiffs, obtained information of the purpose of the defendants to promote a sugar company, from reports in the local newspapers (who gave out such information does not appear); that straightway these defendants were besieged and solicited by the plaintiffs, (except Dee) and others eager to buy stock in the promised company; that no prospectus was issued by the promoters nor were any subscription lists or stock books opened; that when application was made to one of the defendants for stock he would make a memorandum of the name and number of shares in a pass book or on slips of paper carried in the pocket; that before the corporation was organized these slips or lists of names

were handed into Hustace, who allotted the stock to the shareholders, determining who should be permitted to buy and the number of shares; that after Hustace had completed the allotment he caused a printed circular to be sent to each person to whom he had awarded stock in the form following:

"KAMALO SUGAR COMPANY.

Honolulu, April 1899.

Mr.

You are hereby notified that a ten per cent Assessment on shares of stock, (par value \$20.00 each) in the *Kamalo Sugar Company*, to be incorporated under the laws of the Republic of Hawaii, for the amount of 1,000,000 dollars, is now due and payable at my office, Campbell's Block, Merchant Street. If not paid on or before inst., the same will be transferred to other parties.

Yours respectfully,

Frank Hustace.

\$.....due."

That afterwards, on the 20th day of April, 1899, the three defendants held a meeting at Hustace's office which was later denominated, in the minute books of the company, "the first stockholders' meeting of the Kamalo Sugar Company, Ltd.;" that these minutes after reciting that these three defendants were present, representing 48,800 shares of the capital stock out of the entire amount of 50,000 shares and that the articles of incorporation of the company had been filed, read as follows:

"Motion made by Frank Hustace and seconded by J. J. Egan that the corporation agrees to pay the promoters upon their giving a deed to the corporation of all their right, title and interest in the following described property: all options now in the name of Frank H. Foster, also in fee simple the Ahupuaa of Kopuaokolau containing 671 acres and one piece in Kapualai of three acres, more or less, as described in the deed to them from the McCorriston brothers, also the assignment of a certain lease for a term of forty years made by the trustees of the B. P. Bishop estate to the said promoters, together with all buildings,

improvements, rights, privileges and appurtenances therein, including all the stock formerly owned by McCorriston Brothers, viz., 300 head more or less of cattle, 20 head more or less of horses, for the consideration of Sixty Thousand Dollars, (\$60,000) in United States Gold Coin and the transfer to such parties as they may describe the amount of seven thousand shares of fully paid up stock of the corporation, carried." That these minutes make false recitals in at least three particulars; viz.: (1) The articles of incorporation of the Kamalo Sugar Company, Ltd., had not been filed on the 20th day of April, 1899. (2) The promoters did not at that time have a deed for the McCorriston land. (3) They had no lease for the Bishop Estate land. That on the day following April 21st, Hustace began to receive responses to the notices sent the allottees of stock and the payment of the first assessment of ten per centum thereon and that to the parties paying he issued receipts in the following forms:

"No.

Kamalo Sugar Company, Ltd.

Subscriber's receipt.

Honolulu, H. I. 1899.

Received from Dollars, for first assessment of ten per cent on shares of the capital stock of the Kamalo Sugar Company, Ltd., this receipt to be surrendered on the delivery of certificate of stock.

Frank Hustace."

That the first certificates of stock in the company were issued in the latter part of May following; That the articles of incorporation appear to have been signed on the 20th day of April, 1899,—whether they were signed on that day or on the 4th day of May is disputed from the fact that in the date line of the articles an erasure appears. The month as typewritten was erased and "20th" and "April" written in with ink. When this change was made or by whom does not appear from the evidence. That the certificate of acknowledgment attached to the articles is dated May 4th, 1899, and the articles were filed with the Treasurer of the Territory on the 8th day of May, 1899. That the affidavit attached to the articles of incorporation recites that James F. Morgan is President, of the Kamalo Sugar Co., Ltd., J.

J. Egan, Secretary and Frank Hustace, Treasurer, and that the subscribers to the stock are

James F. Morgan	1,500	shares
Frank Foster	2,000	"
J. J. Egan	500	"
A. C. Lovekin	100	"
Frank Hustace	2,000	"
Frank Hustace, Trustee	43,900	"

and that ten per cent of the capital stock of one million dollars had been paid in and the entire amount subscribed for; that this affidavit was sworn to by the three officers named on the 4th day of May, 1899. How or when or by whom these parties were elected to the respective offices in the company does not appear from the minutes of the corporation or other evidence. That the defendants were given an opportunity to show, at the hearing, the amount of money expended in promoting the corporation; that the only proof given was by the defendant Foster, who showed an expenditure of \$180.00; that some \$70,000 was paid to Hustace in response to the notices sent the subscribers on the first ten per centum assessment to the stock awarded; that after this money was paid to Hustace these defendants in pursuance of the resolution of April 20th, appropriated \$60,000 of this money and 7,000 shares of the paid up stock and from this amount they paid the McCorristons in consideration for their land \$25,000 in cash and one thousand shares of paid up stock; that the remainder of the cash (\$35,000) was divided among the defendants as follows: to Foster \$15,000 cash and $\frac{1}{2}$ of the stock and to Hustace \$10,000 cash and $\frac{1}{4}$ of stock and the same to Egan. That the promoters did not disclose to any of the allottees of stock either before or after the payment of the first assessment the amount they intended to take as promoters' fees and that none of the stockholders outside of the incorporators knew of the amount of the profit made by the promoters or anything on the subject; that the company issued a prospectus in September, 1899, publishing the transactions of the promoters; that on May 4th, 1899, when the affidavit accompanying the articles of incor-

poration was subscribed reciting that 10% of the capital stock had been paid in there had not been a dollar paid on the 43,900 held by Hustace as Trustee, except that paid by the plaintiffs and other subscribers.

The Circuit Judge found that the defendants Hustace, Egan and Foster "did unlawfully combine, conspire and confederate and agree together to cheat and defraud the stockholders of the Kamalo Sugar Company, Limited, an Hawaiian corporation, out of the sum of thirty-five thousand (\$35,000) dollars in cash and six thousand (6,000) shares of the paid up stock of the said Kamalo Sugar Company, Limited, as alleged and charged in the plaintiffs' bill on file in this suit." The judge also found that the value of the shares was \$20 at the time and that the conversion of the money and stock was fraudulent and void and ordered the money and stock, or its equivalent in cash, paid to the clerk of the court for the Kamalo Sugar Company, Limited. The judge also allowed the attorneys for the plaintiffs a fee of \$20,000 for their services rendered in said cause. The defendants appealed. Numerous reasons are urged for reversal of the decree appealed from. It will not be necessary to notice all of these in detail.

Much stress is laid upon the fact that the time this company was organized was one of active expansion in the sugar industry; that speculation ran riot and prosperity in all of its delightful luxuriance was here; that the major part of the population of the islands were eager and anxious to buy sugar stocks; that the plaintiffs and others who bought shares in the Kamalo Sugar Company, Limited, did so without asking any questions and considered it a privilege to have shares allotted to them; that the transaction was all a gamble and when the excitement subsided the plaintiffs discovered that they had failed to realize on their exaggerated expectations and by this suit seek to avoid the responsibility of their own folly and to shift the burden of their losses to the defendants.

We are not much impressed with this argument. It finds as little support in morals as in law. It is no doubt true that at the

time in question there was much reckless speculation in corporation shares but it was not given out by the defendants and we assume, in the absence of proof, that none of the plaintiffs had any reason to believe or did believe that the Kamalo Sugar Company was organized as a lottery or a gambling enterprise. The public who were invited to buy the shares of this company had a right to presume that it was promoted as a legitimate enterprise in whose management business integrity, if not ability and prudence, were to be important constituent elements. Counsel have neglected to cite any authority supporting the assumption that the character of a transaction, whether it is right or wrong, honest or dishonest, lawful or unlawful, is to be determined by the degree of prosperity existing in the community. We understand that, in the law, right and wrong, fraud and theft, embezzlement and perjury are the same in sunshine and in rain, in times of plenty and in famine and that the conduct of these defendants must be measured by a fixed standard without reference to the degree of commercial activity at the time of their operations.

The plaintiffs proceed upon the theory that the defendants occupied a position of trust and confidence towards the company and the public that was invited to buy and did buy the shares and that the defendants could not take the money and stock without first disclosing the facts to and obtaining the consent of the stockholders; while the defendants insist that the plaintiffs were not subscribers but purchasers of the stock from Hustace; that the promoters were the original subscribers for the stock and were strangers and had the right to deal with the plaintiffs and all subsequent stockholders and the company at arm's length. The determination of the relation occupied by the defendants towards the company and the plaintiffs is the important issue in this case and its determination, as is conceded by counsel, will settle the other issues involved.

The rule settled by the English authorities is that in order to make a complete contract to take shares there must be an application for shares, an allotment of shares to the applicant and a

communication to him of the allotment. *Rogers Case*, L. R. 3 Ch. 637; *Pellot's Case*, L. R. 2 Ch. 527. If this rule were applied to the facts of this case we would be bound to hold that the offer of the plaintiffs to buy shares, and the allotment by Hustace and the notice sent prior to April 20th constituted a completed contract and each party receiving such notice was a subscriber from that date, at least if the notice was unconditional; if the notice was conditional the contract became complete on payment of the first assessment or earlier if the time of payment was waived or extended. This theory would explain why Hustace afterwards subscribed for stock as trustee and make that act consistent and show that he intended to subscribe and did subscribe for the stock as trustee for the several persons to whom he had allotted stock. The fact that he did not pay the first or any other assessment on any part of this 43,900 shares held as trustee tends strongly to support the theory that such was his intention and purpose at that time and negatives the claim now made that he was absolute owner of the stock and signed as trustee through inadvertence or on advice of counsel.

What relation in general does a promoter bear to the corporation he brings into existence and to the shareholders whom he induces to invest or who voluntarily invest in the stock of the company?

Cook on Stock and Stockholders, Sec. 651, says, "A promoter is considered in law as occupying a fiduciary relationship towards the corporation."

Judge Thompson says, "Although the promoters of a corporation are not its *agents* for the purpose of binding it by their acts and engagements, yet they are its *fiduciaries*; they occupy such a relation of trust and confidence towards the body which they are calling into existence,—or more properly speaking toward those whom they invite to join them in the intended enterprise by becoming members of such body,—as requires the same good faith on their part which the law exacts of the directors of corporations and all other fiduciaries. They are trustees in a sense which disables them from taking to themselves a *secret profit*

made out of their trust to the detriment of the future corporation or its members." Commentaries on Corporations, Vol. 7, Sec. 8286.

"Promoters stand in a fiduciary relation to that company which is their creature." *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, 112; L. R. 3 App. Cas. 1218.

"Whether called prospectors, promoters, agents, trustees, or any other name, they unquestionably solicit and accept trusts from the members of the company and therefore became its fiduciaries." 16 Am. Law. Rev. p. 672.

The law of this question as above quoted is too well established in the jurisprudence of this country and England to be now successfully controverted. Among the many American courts that have announced and followed this view are the United States Circuit Court and the Supreme Courts of California, Missouri, Pennsylvania, New York and Massachusetts." *Chandler v. Bacon*, 30 Fed. 538; *Burbanks v. Dennis*, 101 Cal. 96, 98; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; *Brewster v. Hatch*, 122 N. Y. 349, 362; *The South Joplin Land Co. v. Case*, 104 Mo. 572, 579; *Hayword v. Lieson*, 176 Mass. 310. See also *Clark and Marshall, Private Corporations*, § 110 b.

The defendants admit that they were promoters of the Kamalo Sugar Company but insist that on April 20th they had ceased to be promoters and had become and then acted as stockholders and as such had a right to make the agreement with the promoters for the payment of the money and stock in consideration for the options.

This position is not tenable. These defendants did not cease to be promoters, at least until the corporation, the artificial person, was brought into life. The Kamalo Sugar Company, Limited, was not a corporation until after the articles of incorporation were filed with the Treasurer of the Territory, May 8th, 1899. (C. L. Sec. 2033.) This filing of the articles was the last act necessary to breathe the breath of life into this soulless child of their will. Whether or not the corporate existence reverts back to the signing of the articles, it is not necessary to deter-

mine, since it is clear that the defendants could not, at that time and under the facts of this case, by making a contract with themselves divest themselves of the fiduciary relations assumed as promoters.

What duties were imposed on the defendants by the relation they assumed and occupied towards the plaintiffs and the other stockholders and the company? The law is well established that if a trustee, agent or promoter propose to contract with any person with whom he stands in a relation of trust and confidence, the utmost good faith is required. "It is not enough that they do not affirmatively misrepresent; *they must not conceal; they must speak and speak fully to every material fact known to them*, or the contract will not be allowed to stand." Perry on Trusts, Sec. 178.

"Where persons undertake the promotion of a company for the purpose of purchasing certain existing property, under an agreement with the owner and proposed vendor of such property, by which they receive a certain compensation for promoting the company, they are bound to disclose to those whom they induce to become members of the company, what their compensation is to be. The concealment of such an agreement is a fraud on the company. It amounts to an agreement, by the vendor, with an agent of an intended purchaser, to give him a bribe to betray the interest of his principal. If the promoters of a company conceal such an agreement from those whom they induce to join it, and the company proves abortive, they will not be allowed, in the winding up of the company, compensation for their services, either upon or after the formation of the company." Thompson's Commentaries on the Law of Corporations, Sec. 456.

Again in the following section the same distinguished author says: "Persons who purchase property and then organize a company to purchase it from them, stand in a fiduciary position towards such company, and must faithfully state to the company all material facts relating to the property, which would influence the company in deciding on the desirability of purchasing. In such cases the owners of property who desire to create a company for the purpose of purchasing it from them are bound, if they

wish to make a contract which will stand, to nominate independent directors, and disclose to them the actual facts. The principle upon which courts of equity proceed in these cases is a very familiar one. The promoters of a company, like its directors, is deemed to sustain towards the members of the company the relation of a trustee towards his *cestui que trust*. This being so, he will not be permitted to speculate out of that relation, or to derive secret advantage from it. He is bound to disclose to them fully all material facts touching his relation to them, including the amount which he is to get for his services as promoter, usually called 'promotion money'." Sec. 457.

"Where the vendor becomes a promoter, he is concerned in the sale of the property as vendor; and being a promoter, he is concerned in its purchase as the agent of his company. He acts in a dual capacity. His duties are twofold and conflicting. As vendor he owes it to himself to sell as high, and as promoter he owes it to the company to buy as low, as possible. His performance of those duties is frequently attended with disgraceful perfidy. He is true to himself in securing the highest price for the property but is false to his company by deceiving it as to the worth of its intended purchase, and by lulling its shareholders into unsuspecting reliance that their interests will be looked after and guarded either by himself or by corporate officials, whom he has either already corrupted or intends to circumvent or seduce." * * * "Cases in which the vendor is a promoter and sells to the company at a large undisclosed profit, * * * are the cases in which the doctrine that promoters are corporate fiduciaries is applied oftenest and with the most vigor and effect." 16 Am. L. Rev. p. 673.

The doctrine of the above authorities ought to be recognized as settled law. Its application to varying states of facts, resembling in some instances those of this case is illustrated in the following cases:

McKay's Case, 2 Ch. D. 1; *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; *Archer's Case*, 1 Ch. 322; *Yale Gas Store Co. v. Wilcox*, 64 Conn. 101; *Plaque-mines Tropical Fruit Co. v. Buck*, 52 N. J. E. 219; *Woodbury*

Heights Land Co. v. Londenslager, 55 N. J. E. 78; *Chandler v. Bacon*, 30 F. 583; *Emery v. Parrott*, 107 Mass. 95; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *Bosher v. Richmond and Harrisburg Land Co.*, 89 Va. 455, 460, 461; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; *Burbank v. Dennis*, 101 Cal. 90, 98; *South Joplin Land Co. v. Case*, 104 Mo. 572; *Hayward v. Leeson*, 176 Mass. 310, 326.

Applying the principles established by the authorities to the facts of this case the conclusion is inevitable that the defendants were fiduciaries of the plaintiffs and the Kamalo Sugar Company, Limited; that the duties imposed upon them as such fiduciaries was not discharged by a failure to issue a prospectus and by not misrepresenting the facts; that they were bound under the law to disclose fully and completely the facts; that Frank Hustace, J. J. Egan and Frank H. Foster, could not make a valid agreement with the Kamalo Sugar Company, Limited, at the time acting in the dual capacity for the promoters and the company, whereby they as promoters were given a profit of \$35,000 in cash and six thousand shares of paid up stock, without disclosing the facts to those interested other than themselves, and obtaining their consent thereto; that the failure to disclose the facts was a fraud, whether actual or constructive we need not say, on the plaintiffs and the company and the agreement cannot stand; that in view of this fraud the defendants were not entitled to compensation for their services and the plaintiffs are entitled to recover as decreed.

There may be some doubt whether or not Foster was entitled to credit for \$180.00 for cash paid out but the plaintiffs did not appeal from this and are not objecting to it. If this was error it was one of which the defendants have no right to complain.

The allowance of fees to the plaintiff's counsel seems out of proportion to the services rendered. The majority of the court are of the opinion that under all the facts of the case the fee should be reduced to \$7,500. Personally I think that it should be fixed at \$10,000.

The decree appealed from is affirmed, except the allowance of counsel fees is reduced from \$20,000 to \$7,500.

Geo. A. Davis, T. McCants Stewart, F. M. Hatch, B. L. Marr, J. A. Magoon, T. I. Dillon and J. Lightfoot for plaintiffs.

Robertson & Wilder, Kinney, Ballou & McClanahan and F. W. Hankey for defendants.

Ex Parte WALTER G. SMITH.

ORIGINAL.

SUBMITTED APRIL 23, 1902.

DECIDED JUNE 5, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

On *habeas corpus* to test the validity of a judgment for contempt, the court may consider questions of jurisdiction only and not questions of mere irregularity or error.

All reasonable intendments are made in favor of the jurisdiction of superior courts of record when their judgments are attacked collaterally.

Whether an answer under oath by one cited for contempt operates as a purger or not depends on the circumstances.

Whether all three Judges of the First Circuit may sit together as a court or not is immaterial if, when they do sit together, the presiding judge for the term substantially conducts the proceedings and finally pronounces judgment as if he alone constituted the court, the others being deemed to act in an advisory capacity only.

OPINION OF THE COURT BY FREAR, C.J.

The facts and much of the law are set forth in Mr. Justice Perry's dissenting opinion. The case is one of great difficulty.

There is no doubt that the publication in question would be held a contempt at common law,—whether it should be regarded as relating to a pending case or to a terminated case, or to the judge generally without reference to any particular case, or whether it was in the presence of the court or not. There is also no doubt that it should be held a contempt under our statutes, if the decision in the *Bush* case, 8 Haw. 221, should be followed, for, according to that decision, the legislature in providing, by the Act of 1898 (P. L. § 262), that constructive contempts should no longer be punishable as such, regarded as constructive contempts only those that were not enumerated in the previous statute (P. L. § 257) and did not mean to include all those that are generally regarded as constructive contempts, and the publication in question clearly comes within at least one of the classes enumerated in the previous statute.

If, therefore, this should be regarded as a case of constructive contempt under the general law, the main question for consideration would be whether the decision in the *Bush* case should be followed or reversed. Assuming that that decision was sound when it was rendered, there might still be a question whether the publication, if it could be considered as relating only to the terminated case or to the judge generally, and not to the pending case, could be regarded as a contempt punishable summarily, now that we have come under the provisions of the federal constitution relating to freedom of speech and of the press, which, although not differing materially from the corresponding constitutional provisions in force here when the *Bush* case was decided, might perhaps be construed differently to some extent. See *State v. Circuit Court*, 97 Wis. 1.

But must we regard this as a case of constructive contempt under the general law? It may have been such in fact. We may have found it such if we had passed upon the question in the first instance, or we might find it such if the case were here

on appeal, or perhaps even on writ of error. But must we regard it as such in these *habeas corpus* proceedings? The Circuit Court is a Court of general and superior jurisdiction. Contempt cases are not appealable or subject to review by writ of error under our statutes. *Habeas corpus* is a collateral proceeding. In a collateral proceeding mere irregularities and errors cannot be inquired into as on appeal or error; only questions of jurisdiction can be inquired into, and every presumption is indulged in support of the jurisdiction of a superior court. On appeal or error, judgments of superior courts, at least if the jurisdiction is limited, may be set aside, if jurisdiction does not appear on the face of the record, but on *habeas corpus* they may be set aside only when jurisdiction affirmatively appears to be wanting.

In *Cuddy, Petitioner*, 131 U. S. 280, the petitioner sought release on *habeas corpus* from a judgment of contempt. The act constituting the contempt was set forth in the judgment, but it did not appear whether the act was committed in the presence of the court or not and so whether it was covered by the statute or not. Counsel contended that the act was not committed in the court building or while the court was in session, and that the case was therefore distinguishable from another case that was argued and decided at the same time, in which it was held that an act committed in a room near the court room and while the court was in session was "in the presence" of the court. It appeared that the act consisted of an attempt to influence one who had been impanelled as a juror for the term but before he was called for the particular case. Apparently it was in fact (as appeared by the record of the lower court, *In re Cuddy*, 40 Fed. R. 62, but not by the record in the Supreme Court) committed a quarter of a mile from the court house and when the court was not in session. The court said in substance that neither the petition for the writ nor the part of the record of the lower court that was produced showed the particular locality where the act was committed, and that upon a collateral attack by *habeas corpus* every intendment was made in support of the

jurisdiction of superior courts, and remanded the petitioner to custody.

The present case is before us in a very unsatisfactory state. The mittimus seems to refer to two convictions, both, however, apparently intended to cover the same or nearly the same ground, the one referring for the facts to the affidavit on which the citation was issued, the other purporting to set forth the facts and, among other things, stating that the published matter was false, malicious, etc. and had special reference to the case on trial and to the judge presiding therein, and was circulated and published in the court room during the trial of the case, that it was calculated to and did prejudice the minds of the jury and prevent a fair and impartial trial and was calculated to and did obstruct the court in the administration of justice, and in its duties in the trial of the case then pending and undetermined. What purports to be a transcript of the stenographer's notes of the proceedings shows only one conviction, which refers to the affidavit for the facts. It contains also an oral opinion delivered by another judge who was with the trial judge on the bench; also the testimony of certain witnesses, which shows that the jurors in the pending case saw the alleged contemptuous publication in the hall and room adjoining the court room, if not in the court room itself, but does not show what the petitioner had to do with its circulation in or near the court room as distinguished from the city at large, nor does it show whether the court was in session at the time. Whether the presiding judge himself saw the paper circulated in the court room during the trial does not appear except by the recital in the mittimus. The transcript does not indicate that it contains all the evidence, though there is nothing to show that it does not, nor is the usual stenographer's certificate attached to it though it is signed by the stenographer, nor was it made a part of the record in this court nor does it purport to have been filed or to be a part of the record in any court. We would be justified, however, in overlooking these irregularities as counsel on both sides have taken it for granted that the transcript was complete and a part of the record. The affidavit sets forth in substance that the petitioner

made and published for circulation the matter in question, intending thereby to throw disrespect upon the judge and to present the former action in a ludicrous, etc. manner, and to prejudice the case in the minds of the public and jury trying the cause, and that by reason of said published matter and intending to publish animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same and to prevent and obstruct the administration of justice, and by knowingly publishing an unfair report of the proceedings of the court and malicious invectives against the court and jury tending to bring the administration of justice into contempt, etc., did commit a contempt of court. No allegation was made in the petition, nor was any offer made in this court to show just where or under what circumstances the publication and circulation took place, nor was any attempt made to show these things in the lower court by the testimony of the witnesses for the petitioner or on cross examination of witnesses against him or in any other manner than by the petitioner's answer, under oath, denying knowledge of the pendency of the second case and alleging that the publication related to the first case only.

The contention that the petitioner thereby purged himself of the contempt cannot avail in this collateral proceeding, considering that the lower court found against him and considering all the circumstances under which that finding was made, assuming that in our opinion the finding was erroneous. We must in these proceedings regard the publication as relating to the pending case.

Thus, it is not clear whether the court found that the publication or circulation took place in the court room or not, and it would seem to be immaterial whether it was in the court room or in the adjoining hall or room, if the other necessary conditions were present. It is not clear whether the court was in session or not. Perhaps that also would be immaterial, if it was during a recess merely or temporary adjournment from one day to the next, and if the other essential features were present. It is not clear whether the petitioner had anything to do with the

publication or circulation in or near the court room or not. This is very material, unless the petitioner should be regarded as responsible in law for the publication and circulation there as a natural and probable consequence of the publication and circulation of a paper of such general circulation in the city where the trial was pending. Whether he should be thus held responsible is a nice question, the affirmative being held by very respectable authority, and no argument or authority having been presented on behalf of the petitioner in support of the negative. Whether the decision in the *Bush* case which, if followed, requires us to remand the petitioner to custody, in any view that can properly be taken of the case on the evidence, should be reversed, is also, to say the least, a nice question,—upon which no argument has been presented on behalf of the petitioner, although that decision is most strenuously urged *contra*.

If, as is the case in some other jurisdictions, contempt cases were appealable under our statutes, and this case were before us on appeal, or, if the statute required the court in adjudging a contempt to explicitly set forth all intermediate necessary findings upon which the final judgment is based, the result might perhaps be different. But in the absence of such findings or of an affirmative showing of want of jurisdiction either by the record or by matter outside of the record, the judgment cannot be set aside in a collateral proceeding.

The fact that all three Judges of the Circuit Court sat at the hearing of the contempt case does not make the proceedings void. Whether they might properly all sit as a court, it is unnecessary to say. For, although during the earlier stages of the hearing they seem to have regarded themselves together as constituting the court, yet the part that the judges other than the presiding judge took was unimportant and was joined in by the presiding judge, and before the end of the case the view was apparently taken that the two former were there in an advisory capacity only, and the presiding judge alone finally pronounced judgment in form as if he alone constituted the court.

The case as a whole presents many fertile themes for comment, but it is unnecessary to discuss them.

The petitioner is remanded to the custody of the High Sheriff.
Smith & Lewis and *Andrews, Peters & Andrade*, for the petitioner.

Geo A. Davis, contra.

CONCURRING OPINION OF GALBRAITH, J.

The petitioner was charged and found guilty of contempt of the Circuit Court of the First Circuit of this Territory. This court cannot in *habeas corpus* examine and determine whether or not the facts were sufficient in our opinion to constitute the offense or the sentence unduly severe, as might be done on appeal or writ of error if such process were available. The only question presented in this proceeding is one of jurisdiction or power of the court to impose the sentence complained of, the court's jurisdiction over the subject matter and the person of the petitioner being admitted. *Ex parte Fugihara Oriemon*, 13 Haw. 102, 106, 107.

It is argued with great industry in the brief of the petitioner that the legislative had the power to define what shall constitute contempt of court and prescribe the punishment in all legislative courts and that the Circuit Court of the First Circuit is such a court. This position may be admitted. The legislature has acted on the subject and I may concede, rightfully.

Section 257, Penal Laws, reads as follows:

"Contempt of Court.

"Sec. 257. Whoever, after trial by jury, is adjudged guilty of contempt of any judicial court, whether by open resistance to the process or proceedings thereof, or of any Judge or Justice thereof in the lawful exercise of his judicial functions; or by insulting, contemptuous, contumelious, disrespectful or disorderly language, behavior or act, or breach of the peace, noise or other disturbance in the presence or hearing thereof when in session; or by willful disobedience or neglect of any lawful process or order; or by refusing to be sworn as a witness, or when sworn, to answer any legal and proper interrogatories; or by publishing animadversions on the evidence or proceedings in

a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; or by knowingly publishing an unfair report of the proceedings of a Court, or malicious invectives against a Court or jury tending to bring such Court or jury, or the administration of justice into ridicule, contempt, discredit or odium, shall be punished by imprisonment at hard labor not exceeding two years, or by fine not exceeding five hundred dollars; provided, however, that every judicial tribunal, acting as such, and every Magistrate acting by authority of law in a judicial capacity, may summarily punish persons guilty of contempt, as follows:

"1. The Supreme Court, by imprisonment not more than three months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment, in the discretion of the Court.

"2. Any Circuit Court, or any Court of Probate, by imprisonment not more than two months, or by fine not exceeding one hundred dollars.

"3. Any Circuit Judge or Police Justice, by imprisonment not more than thirty days, or by fine not exceeding fifty dollars.

"4. Any District Justice, Coroner, or other person acting in a judicial capacity by authority from any Court of Record, by imprisonment not more than ten days, or by fine not exceeding ten dollars."

The Circuit Courts of this Territory are authorized by this statute to punish summarily persons adjudged guilty of contempt of court. It will be observed that some of the acts set out in the statute would be under the common law direct contempt and that others would be indirect or constructive contempt, but the legislature in enacting the statute did not classify the offense according to the common law or otherwise, and I dispute the authority of this court to make a classification that the legislature did not make or authorize.

It is not profitable to discuss the mittimus or its contents, since there is a judgment in the record before the court. The petitioner was charged in the motion and affidavit with contempt of court in the language of the statute (Sec. 257) and the judgment runs, "It is therefore the judgment of this court that you be and you are hereby adjudged guilty of contempt of court

as set forth in the affidavit." "This language fits exactly the words of the statute." (*In re Bush*, 8 Haw. 223.)

But it is contended that under the definition given in the Law Dictionary and in the decisions of some courts, the acts charged in the affidavit would not constitute direct contempt but would be indirect or constructive contempt and that the legislature has taken away the power of the court to punish summarily for constructive contempt and therefore the judgment was void. This argument is based principally on the construction of the Act of August 20, 1888. This Act contains three sections (Session Laws 1888, p. 98). It is entitled "*An Act to define and limit the authority of courts and judges to punish for contempt in certain cases.*"

"Sec. 1. The publication of proceedings before any court or judge shall not be deemed to be contempt, nor shall such publication be punishable as contempt.

"Sec. 2. Constructive contempts shall not hereafter be punishable as such.

"Sec. 3. The terms of this Act shall apply to the publication of all proceedings in all courts, or before all judges, hitherto had, now pending or which may hereafter be brought."

There is no repealing clause with the Act and no reference is made therein that would indicate any intention on the part of the legislature to repeal any existing statute. Sec. 257, P. L., was in force at that time. The title of the Act shows that the intention of the legislature was not to repeal some existing statute but to "define" and "limit the authority." The definition was given in the first section, i. e., publication of proceedings and the limitation in the second section, constructive contempt. The publication of proceedings before the court had been held to be contempt although not made so by Sec. 257. It was this construction that the legislature intended to restrain and this power limit. It is generally supposed that this Act resulted from certain decisions of this court rendered a short time previous. In *Ackerman v. Congdon*, 7 Haw. 31, the publication of pretended facts in relation to a civil case pending in this court, was held not to be within any of the provisions of Sec. 257, but

that aside from the statute it was a constructive contempt and punishable by the court. In *Smith v. Aholo*, 7 Haw. 115, it was held that the publication of the contents of a bill in equity filed in court was constructive contempt under the rule announced in the *Ackerman* case and punishable as such. I think that the constructive contempt in the legislative mind was that as defined in the *Ackerman* and *Smith* cases expressly held by the court not to be within the provisions of Sec. 257.

This construction is supported by the decision of this court rendered at the February term, 1891, wherein the same contention was made by the petitioner as is made in this case. The court said, "Were we to proceed alone upon the common law, the contention of counsel would seem to be sustained by authority. But we have a statute which, so far as we have learned, is peculiar to this country, and which describes and enumerates certain acts and circumstances as contempts and makes them punishable upon indictment and conviction by a jury and also summarily. These acts are not classified in the statute as direct and constructive contempts. Some of these acts would fall under one head and some under another, as generally classified. By our penal law, however, they are all contempts and punishable either summarily or upon indictment, or in both ways."

"The legislature in enacting the law of 1888 had in mind, without doubt, the then recent cases decided by this court in which certain publications, avowedly not of the character enumerated in the Penal Code as contempts, were construed by the court to be contempt and these the legislature declared to be no longer punishable as such." *In re Bush*, 8 Haw. 222, 223.

This decision interpreting and defining the intention of the legislature in passing the Act of 1888, was rendered when the court was composed of the late Chief Justice Judd, Justices McCully, Bickerton and Dole. Each member of the court at that time was closely identified with the interests of the islands and thoroughly familiar with their history. They were certainly in a better position to know the intention of the legislature in enacting the law of 1888, than any one of the present mem-

bers of the court. It seems to me that the decision in the Bush case is controlling in this. I concur in the judgment of the Chief Justice remanding the petitioner.

DISSENTING OPINION OF PERRY, J.

The petitioner was sentenced to imprisonment for the term of thirty days for an alleged contempt of the Circuit Court of the First Circuit and then brought this petition for a writ of *habeas corpus* to determine the legality of such sentence and commitment. Many questions are presented.

One McCarthy was tried in the Circuit Court upon a charge of mayhem. The jury rendered a verdict of guilty. Thereafter, upon motion of counsel, the court discharged the defendant on the ground that there is no such crime known to our law as mayhem. This was on March 5, 1902. On March 11, McCarthy was arraigned before the same court on a charge of assault and battery based on the same acts, and the trial was begun. In its issue of the day following, and while the trial was still pending and the case undetermined, the Pacific Commercial Advertiser, a newspaper printed and published in this city, of which newspaper the present petitioner was then the editor, contained a certain cartoon and certain printed words said to be of and concerning the Hon. George D. Gear who was the judge presiding at the two trials referred to. One of the attorneys for the defendant on the day last named presented to the court a motion or affidavit praying that the editor of the Advertiser be cited to appear and show cause why he should not be summarily punished for contempt of court, charging in the affidavit that the editor "did make and publish for circulation an insulting, contemptuous, contumelious, disrespectful cartoon or picture a copy of which is hereto attached and made a part hereof, intending and meaning thereby to throw disrespect upon the Honorable George D. Gear, one of the judges of said court, and the presiding judge at both of the trials hereinbefore named; and in said cartoon or picture intending to and attempting to represent

the former action in a ludicrous and disgraceful manner of him the said Honorable George D. Gear in his official and judicial capacity, as well as to prejudice the case of said defendant in the minds of the public and jury trying said cause and that by reason of said insulting, contemptuous, contumelious and disrespectful picture or cartoon, and intending to publish animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; and by knowingly publishing an unfair report of the proceedings of the Court, and malicious invectives against the court and jury tending to bring such court and jury, and the administration of justice into ridicule, contempt, discredit and odium, did then and there and thereby commit a contempt of court." An order was thereupon issued citing Smith to appear at a time stated and show cause why he should not be adjudged guilty of contempt "in publishing, printing and circulating the said statement of and concerning the Presiding Judge of this Court and the cartoon or picture with reference to a cause now pending and undetermined in this Court, to wit: the case of the Territory of Hawaii against William McCarthy, and which said statement and publication and picture or cartoon is well calculated to prejudice and will prejudice the minds of the jury sworn to try the issues and hinder, obstruct and prevent the court and jury in the discharge of their duties and the Administration of Public Justice." The respondent appeared and filed a return and after certain other proceedings had been had, judgment was rendered and sentence pronounced.

In the view which I take of the case, it becomes material to consider whether the respondent in that proceeding was committed and sentenced for a constructive contempt or for a direct contempt.

As to the distinction between these two classes of contempts. "A direct contempt, or a contempt *in facie curiae*, is noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings; or an open defiance of

its powers or authority; or disrespectful behavior or language to the presiding judge; or any improper conduct tending to defeat or impair the administration of justice. An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends by its operation to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the due administration of justice.”—7 Am. & Eng. Encycl. Law, 2nd ed., 27. “Contempts are defined to be, direct, such as are offered in the presence of the court, while sitting judicially, or constructive, such, though not in its presence, as tend to obstruct and embarrass or prevent the due administration of justice.”—*State v. Wilson*, 64 Ill. 195. “The contempt is direct when committed before and in the presence of or so near to the court as to interrupt the proceedings of the court. * * * Contempts are constructive when they are committed not in the presence of the court, and when they tend by their operation to interrupt, obstruct, embarrass or prevent the due administration of justice.”—*Whittem v. State*, 36 Ind. 196, 212, 213. “Contempts are generally divided by jurists into the classes of direct and constructive; direct being those committed in the presence of the court, and constructive being those acts which the court would have to construe by some process of reasoning to be equivalent to a direct contempt.”—*In re Bush*, 8 Haw. 222. See also Church on *Habeas Corpus*, §306; *Bradley v. State*, 50 L. R. A. 692 (111 Ga. 168); *Cooper v. People*, 22 Pac. (Colo.) 795; *State v. Kaiser*, 20 Or. 57.

Assuming that the cartoon and words complained of are of the nature charged in the affidavit, i. e., insulting, contemptuous, contumelious, disrespectful and tending to obstruct and prevent the administration of justice, and that, as contended on behalf of the present respondent, they were of and concerning the case then pending and undetermined and not, as contended on behalf of the petitioner, of and concerning the case first tried and then concluded, and that the Circuit Court so found, and that such finding cannot be reviewed on *habeas corpus*, still, if the objectionable matter was published and circulated or caused

to be published and circulated by Smith, or even, perhaps, by the proprietors of the Advertiser, only in the city generally and not in the court room or in the adjoining portions of the court house, these acts would at most constitute a constructive contempt only. If, on the other hand, Smith or, let us say, the proprietors, published and circulated such matter, or caused it to be published and circulated, within the court room or in the adjoining portions of the court house, the contempt would be direct. Although there may be, perhaps, a few authorities to the contrary, this is supported by the great weight of authority. In *Cooper v. People, supra*, immediately after the language above quoted, the court said: "The acts here complained of belong to the latter class" (constructive), "if either. They consist of the publication in a newspaper, of general circulation in the place where the court was being held, of such articles in reference to a case pending as were calculated to interfere with the due administration of justice, as it is said." "We have in this case, not a case of direct contempt, but a case of indirect or constructive contempt alleged to have been committed by the publication of these several articles in a daily newspaper, which are alleged * * * were intended to and did prejudice the people against the court and grand jury, embarrass the administration of justice and reflect upon the court and its proceedings."—*Fishback v. State*, 131 Ind. 304, 312. "A newspaper corporation which deliberately seeks to influence judicial action by the publication of articles threatening the judges with public odium and reprobation in case they decide a pending cause in a particular way, is guilty of constructive contempt."—*State v. Bee Publishing Co.*, 50 L. R. A. (Neb.) 195.

Ackermann v. Congdon, 7 Haw. 31 (January, 1887), was a case of a publication in a newspaper of an article containing expressions which were deemed by the court to be "calculated to prejudice the tribunal which was to try defendant's case and render it unfavorable to him." The defendant's case referred to was pending. The publication was held to be a contempt, but that it was regarded as a constructive contempt is plain from

the language of the court: "As the case before us is the first instance of constructive contempt of this character brought to our notice, and as the case is not a serious one, we impose no fine." (p. 38.)

In *Smith v. Aholo*, 7 Haw. 117 (April, 1887), the publication in a newspaper, was of an abstract of a bill in equity and while the suit was pending. The court said: "We had occasion, at the January term, 1887, of this court, in the case of the Hawaiian Gazette, *ante*, page 31, to say that such publications as appear to have a prejudicial effect upon the rights of the parties in cases pending in the courts, were punishable as constructive contempts of court. * * * The publication in question comes within the principle laid down in the *Gazette* case, and is fully sustained by authority." See also, on this subject, *State v. Circuit Court*, 72 N. W. (Wis.) 193, 195.

The case of *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, cited for the respondent, does not hold to the contrary. It was immaterial in that case whether the contempt was direct or constructive, for the court was not limited by statute in the matter but had power to punish either or both. The court merely held that the publication was *a* contempt, and while it said, p. 298, "If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is *analogous* to a contempt committed in the presence of the court," it also said, "The contempt, if there was one, *was not, strictly speaking, committed in the presence of the court*, but it related to a trial then before the court." (Italics mine.)

The mere fact that the petitioner, at the time that he published or caused to be published and circulated, generally, the newspaper containing the matter in question, knew, if he did, or must have known, that some subscriber or subscribers, to whom the paper would be delivered in due course, might bring copies of the paper to the court room and there circulate or publish them, would not of itself, on any principle that I know of, render the petitioner criminally liable for such publication or

circulation in the court room. (There is, it is true, authority to the contrary.) To convict him upon such facts would be to hold him liable for the acts of others not aided, incited or encouraged by him. Such a case would not come within the rule as to responsibility for the natural and plainly probable consequences of one's acts.

Bearing in mind these definitions and distinctions, of what offense does the mittimus show the petitioner to have been adjudged guilty and for what offense does it show that sentence was imposed upon him?

After reciting in full the motion for citation or affidavit the mittimus further recites that Smith was cited to answer "to the *said charge* of contempt which had been duly filed against him" and that upon due hearing of the evidence and of counsel "in support of the charge" and *contra* "the said Circuit Court found the said Walter G. Smith guilty of *a contempt* of this court *as charged in the affidavit and motion.*" The affidavit and motion, as appears from the quotation above made, charged a constructive contempt only; it charged that the petitioner "did make and publish for circulation" the matter referred to and, perhaps, that he knowingly published an unfair report of the proceedings and malicious invectives, etc. It did not, directly or indirectly, charge a publication or circulation by the petitioner or by any one else in the court room or in the court house. Thus far, then, the mittimus shows a conviction of a constructive contempt only.

The Cuddy case (131 U. S. 280) is distinguishable from that at bar. In the former the finding of the lower court was that the petitioner "did approach" a certain juror with a view to influencing him. The record in the *habeas corpus* proceedings was entirely silent as to the place where the juror was approached. The words used in the finding were consistent with the theory that the act was committed in the presence of the court as well as with the theory that it was not committed in the presence of the court. The Supreme Court held that under those circumstances the presumption was that the court found that

the juror was approached in the presence of the court and that therefore the sentence was valid. In the case at bar, on the other hand, the record shows affirmatively, as it seems to me, that the acts charged were committed elsewhere than in the court room or court house. The language of the affidavit, adopted and made a part of the judgment and mittimus, is to be read in its ordinary acceptation. So read, it means, if it means anything, that the making and publishing was away from the court house. When one says that the "Advertiser" is "a newspaper printed, published and of general circulation within Honolulu" and that in its issue of a certain day the said newspaper and its editor and servants, "did make and publish *for circulation*" certain matter, he certainly does not mean that it was in the court room or court house that the editor and others did so make and publish *for circulation*. The language used seems to me to be incapable of such a construction.

The next and last recital of the mittimus in the case at bar is as follows: "And whereas the said Walter G. Smith was guilty of a contempt of this Court by publishing and printing a certain false, scandalous, malicious and defamatory statement accompanied by a printed picture or cartoon, which said statement and cartoon had especial reference to the case of the *Territory of Hawaii v. William McCarthy* and to the conduct and judicial acts of the judge presiding on the trial of said cause, which said false, scandalous, malicious and defamatory statement and printed picture or cartoon was circulated and published in the Court room, in the Court house in Honolulu during the trial of the cause of the *Territory of Hawaii v. William McCarthy*, which said publication was calculated to prejudice and did prejudice the minds of the jury and prevent a fair and impartial trial of the issues involved in said case, and is calculated to obstruct and did obstruct the Circuit Court in the administration of justice and in its duties in the trial of said cause which was then and is now pending and undetermined." Of this it is to be observed that it is not a recital of a conviction or of an adjudication of guilt, but merely that Smith *was* guilty.

The mittimus, however, is not the judgment or verdict; it is merely a formal order issued to the Sheriff reciting that a certain judgment or verdict has been theretofore rendered and sentence passed and directing the execution of such sentence. It is not sufficient that the mittimus recite that the accused *was* guilty but it must show on its face that he has been *adjudged* guilty by a jury or by the court, as the case may be. In other words even though an accused is guilty, a conviction or judgment to that effect by a competent tribunal is necessary to support a sentence or the execution thereof. Without such conviction or judgment, the sentence and order of execution would be invalid. "But it is clear that a general order to imprison a party unless he has been convicted either by a jury or by the court is a mere nullity. The law requires that before a sentence of imprisonment shall be passed against a party, he should first be convicted of an offense. In ordinary cases, this conviction must be by the verdict of a jury. In the case of contempts, it may be by the judgment of the court. Still, in either case, the record must show a conviction. Now it will be seen from this return that there is no judgment of imprisonment for a contempt generally, or for a contempt in refusing to answer questions. There is not any conviction or adjudication by the court that Mr. Adams had been guilty of a contempt. Without such judgment the court had no right to commit him to prison, nor the sheriff to detain him. It is true, and was admitted on the argument, that Mr. Adams did refuse to answer questions asked by the grand jury, and it may be true that the court considered that a contempt for which he deserved imprisonment, but no such judgment has been rendered in the case; and however many contempts the prisoner may have committed, it is not lawful to imprison him until convicted thereof by the judgment of the court, which judgment and conviction must appear by the record."—*Ex parte Adams*, 25 Miss. 892 (59 Am. Dec. 234, 242, 243). "So that it appears that there has been *no adjudication* that petitioner and his associates have been guilty of a contempt. If this be true, then the commitment, occupying as it does the place

of *an execution*, has no basis on which to rest. For it is the *judgment* and not the *mittimus*, by virtue of which the party committed is detained. *People ex rel. v. Baker*, 89 N. Y. 460. Unless the *record* shows a judgment of conviction of contempt, a petitioner may avail himself of the remedy provided by *habeas corpus*."—*Ex parte O'Brien*, 127 Mo. 477, 488, 489. See also *Ex parte Van Sandau*, 1 Phillips 604, 606, 607; *People v. Bennett*, 4 Paige 282; *In re Blair*, 4 Wis. 521; *Sherwood v. Sherwood*, 32 Conn. 1.

Assuming, however, that the language used can be held to be an averment of a conviction or judgment of guilty of the offense there stated, such offense so recited is, so far as the petitioner is concerned, a constructive and not a direct contempt. The recital is that "Walter G. Smith was guilty of a contempt of this court by *publishing and printing*" a certain statement and cartoon, "which said * * * statement and * * * cartoon was *circulated and published* in the court room in the court house in Honolulu during the trial * * *" This is not a statement that the matter was circulated and published in the court room or caused to be so circulated and published *by Smith*; it is not a recital of a conviction of Smith for contempt by "publishing and printing" and by "circulating and publishing in the court room." In my opinion, as stated above, the printing and publication generally away from the court room may have been by Smith and the circulation and publication in the court room may have been by others for whose acts Smith would not be criminally responsible.

It may be remarked in this connection that it is not to be presumed that the court or the clerk issuing the *mittimus* intended or attempted to make therein an untrue or incorrect recital as to what the conviction or judgment was; and if it had been intended or attempted to state in the *mittimus* that the petitioner had been convicted or adjudged guilty of circulating and publishing *in the court room*, such statement would have been untrue and incorrect. After the introduction of the evidence, Circuit Judge Humphreys (the three judges of the Cir-

cuit Court sat together during the proceedings, but in what capacity or whether legally or otherwise I need not say) delivered the opinion of the judges or of the court and in concluding said: "It is the unanimous opinion of the judges of this court that the defendant should be held guilty *as charged in the complaint* herein." Following him Judge Gear, presiding at the term, said: "The judges have unanimously decided that this matter published has constituted a contempt of court *as charged in the complaint or affidavit* and I therefore find and adjudge you guilty of contempt of court *as alleged and set out in the affidavit on file* and ask you now if you have any reason to offer why sentence should not be passed upon you. * * *

And I will state now that the court has considered with both the other judges and come to the conclusion as to a proper sentence to be pronounced, having taken that into consideration in extenuation of the offense, and it is therefore the judgment of this court that you be and you are hereby adjudged guilty of contempt of court *as set forth in the affidavit*, and you are sentenced to imprisonment in Oahu Jail for the period of thirty days without hard labor." Clearly the adjudication of guilt was of the offense charged in the affidavit and that, as already stated, was a constructive contempt only and not a circulation or publication *in the court room*.

Going still further, and assuming that the paragraph of the mittimus in question is a recital of a conviction of Smith of a contempt by printing and publishing and by circulating and publishing *in the court room*, and assuming that such finding of the court below cannot be disturbed on *habeas corpus* even though there be no evidence to support it, I am of the opinion that the sentence and mittimus are invalid because the court had no jurisdiction to impose the one or issue the other in the absence of a conviction or judgment of guilty of that offense (this, of course, in view of my conclusion, to be hereafter stated, that the Circuit Courts of this Territory have no authority to punish for constructive contempts.) The authorities above cited sufficiently cover this point. The principle is the same where

the conviction is of an offense which the court has no jurisdiction to punish and the sentence and mittimus are for another and different offense, as where there is no conviction or judgment at all.

Has the Circuit Court of the First Circuit power to punish for constructive contempts? Under this head several questions have been presented and argued.

In August, 1888, the legislature of the monarchy passed an act (Chap. 42, Laws of 1888), the second section of which reads as follows: "Constructive contempts shall not hereafter be punishable as such." This language, taken by itself, is plain,—so plain as to leave no room for construction. It is contended, however, that read in connection with the two other sections of the statute, and in view of the causes that led to its enactment it must be construed to refer to such only of constructive contempts as are mentioned in section 1. The latter section reads: "The publication of proceedings before any court or judge shall not be deemed to be contempt, nor shall such publication be punishable as contempt"; and section 3: "The terms of this act shall apply to the publication of all proceedings in all courts, or before all judges, hitherto had, now pending or which may hereafter be brought." In my opinion, sections 1 and 3 do not contain sufficient to justify the limitation sought to be placed upon the plain language of section 2. If the words "constructive contempts" used in section 2 were intended to refer solely to the "publication of proceedings" mentioned in section 1, then section 2 is pure repetition and wholly superfluous. Section 1 of itself provides that such publication shall not be deemed to be contempt and further that such publication shall not be punishable as contempt. Under the circumstances, the presumption, if any, is that the legislature did not repeat unnecessarily and that it intended to include in section 2 something not already included in section 1. The presumption is further that the legislature in using the word "constructive" knew the distinction between constructive and direct contempts. The purpose of section 3 evidently was to provide that the proceedings permitted by the act,

to wit, by section 1, to be published, included *all* proceedings, in whatever court and at whatever times had.

In enacting this statute the legislature doubtless had in mind certain cases then recently decided by the Supreme Court but it is a mistake to suppose that those decisions were simply to the effect that the publication of proceedings was a constructive contempt and punishable as such. Such indeed was the ruling in *Smith v. Aholo, supra*, decided in April, 1887; but in *Ackerman v. Congdon, supra*, decided in January, 1887, the publication held to be a constructive contempt was, not of proceedings, but of newspaper comments or expressions which were deemed to be such as tended to influence the result of a pending suit. The same is true of the publication, held to be contempt, in *King v. Lee Fook*, 7 Haw. 249, (decided at the February Term, 1888, just before the legislature convened). It was not of proceedings but of matter tending to prejudice the right of the defendant to a fair and impartial trial. So far as history is concerned, then, there is good reason for believing that the legislature meant what it said, i. e., to prohibit thereafter the punishment as such of constructive contempts (which means any or all constructive contempts) and not merely of some constructive contempts.

In the case entitled *In re Bush*, 8 Haw. 221, the court construed the statute differently, holding that by "constructive" contempts the legislature meant those only which were not enumerated in section 257 of the Penal Laws. With respect, it seems to me that there is no sufficient ground for so construing the statute. It is contended that this court must now follow that decision because of the rule that where a statute, which has received a judicial construction, is re-enacted in the same or substantially the same terms, that is to be deemed a legislative adoption of such construction. The re-enactment here referred to is that contained in the Organic Act. The question is one as to the intention of Congress in passing the Organic Act, and this intention is to be ascertained from a reading of the Act as a whole. Section 6 provides, "that the laws of Hawaii not incon-

sistent with the Constitution or laws of the United States or the provisions of this Act shall *continue in force*, subject to repeal," etc. "Continue in force" means, "be of the same force," not more and not less, after as before the time stated. Section 81 provides that "until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." Before the Organic Act went into effect the Supreme Court had jurisdiction and authority to overrule any of its former decisions, with possibly some exceptions, real or apparent but not here material, and the act of 1888 was open to construction by the court and subject to having any former construction modified if to the court it should seem right and just to do so. In my opinion, Congress intended by the Organic Act to continue the same powers in this court in this respect which it theretofore had and the rule of construction contended for does not apply in this case. In so far, then, as the court in the Bush case held to the contrary on the subject of the construction of the Act of 1888, it should be overruled.

It is also contended that section 257 of the Penal Laws, which defines certain acts to be contempts, sets forth in the enumeration certain constructive contempts, that therefore if section 2 of the Act of 1888 is construed to include constructive contempts other than the publication of proceedings, that act would by implication repeal section 257 in part, and that repeals by implication are not favored. It is true that repeals by implication are not favored, but nevertheless there may be such repeals and they are to be given effect where the language and intent are clear.

The argument that the restriction contained in the Act of 1888 does not apply to the Circuit Court of the First Circuit because said court was not then in existence, is not sound. The provision clearly is sufficiently broad to apply to courts thereafter created as well as to courts then in existence. "The mere fact that the statute existed before that court was created does

not exclude it. The legislature made use of general language for the purpose, as it would seem, of applying the act not only to existing courts but to any that might thereafter be created."—*Middlebrook v. State*, 43 Conn. 267.

Was the Act of 1888 unconstitutional? The constitution in force at the time of its enactment was that of 1887, Article 64 of which was as follows: "The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such inferior courts as the legislature may from time to time, establish." Article 66 reads: "The Judicial Power shall be divided among the Supreme Court and the several inferior courts of the Kingdom, in such manner as the legislature may, from time to time, prescribe, and the terms of office in the inferior courts of the Kingdom shall be such as may be defined by the law creating them." The Circuit Court of the First Circuit was created by the legislature under that provision of the constitution. It was, under the Monarchy and the Republic, a legislative as distinguished from a constitutional court, and it was competent for the legislature which created it to define or limit its powers in the matter of contempts. "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying

the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."—*Ex parte Robinson*, 19 Wall. 505, 510, 511. See also *Ex parte Buskirk*, 72 Fed. 19; *Ex parte Poulson*, Fed. Cs. No. 11,350; *State v. Kaiser*, 20 Or. 57. Whether or not the Act of 1888 applied at the time of its enactment or applies now to the Supreme Court, is another question. Even if it did not so apply, still it was constitutional as to the inferior courts. See *Robertson v. Pratt*, 13 Haw. 590.

The Act of 1888, being valid at the time of its enactment and in force at the date of the Organic Act, was continued in force by section 6 of the latter act.

It is contended that the Organic Act is the Constitution of this Territory, that, since in section 81 it is provided "that the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish," the Circuit Court of the First Circuit is a constitutional court, and that therefore its power to punish for contempt can not be limited. If, however, we are to regard the Organic Act as our constitution and as the instrument by which the Circuit Court was created, then it is also true that the limitation of authority was by the same instrument and by the same power which created the Circuit Court. Surely the power, whether it be the people directly or Congress, which grants a constitution and thereby creates a

court, may also define or limit the powers of that court. It may even legislate it out of existence.

My conclusion is that section 2 of the Act of 1888, in its application to the Circuit Court of the First Circuit is constitutional, valid and in force. Nor is the restriction thereby placed upon that court a novel one. The citations already made disclose some instances of similar limitations elsewhere; for other instances, see Laws of Pa., Duplicate, 1835, 1836, p. 793; Throop's Ann. Code of Civ. Pro. (N. Y.), §8, p. 6; *Galland v. Galland*, 44 Cal. 475, 478. "The force of public opinion in this country, in favor of the freedom of the press, has restrained the free exercise of the power to punish this class of contempts" (constructive), "and in many jurisdictions statutes have been enacted depriving the courts of the power to punish them."—Rapalje, Contempts, §56.

In my opinion, the sentence and commitment, if for a constructive contempt, are illegal and invalid for lack of jurisdiction on the part of the court to punish for such contempts, and, if for a direct contempt, are illegal and invalid for lack of jurisdiction on the part of the court to impose such sentence or order such commitment, no judgment of guilty of such offense having been rendered. The petitioner should be discharged.

THE HONOLULU INVESTMENT CO., Limited, v. HELEN ROWLAND, THOMAS METCALF, J. RODRIGUEZ, FRANCISCO JOSE, ANTONIO dos SANTOS, DOMIAO de MEDEIROS, A. J. FARIA, CHUN HUNG, YEE CHEW FAN, JAMES PROSSER, EMMA M. NAKUINA, JOHN WRIGHT, LYDIA ROWLAND WRIGHT, FRED KLEMME, CHRISTIANA GOMES, J. S. EMERSON, WILLIAM O. SMITH, Trustee, and FRANK GODFREY, Trustee for Thomas Metcalf.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 23, 1902.

DECIDED JUNE 6, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

T. devised certain land to F.'s "children lawfully begotten". F. had a daughter, E., begotten and born out of wedlock. E.'s father and mother intermarried after her birth. *Held*, that E. was not a lawfully begotten child of F., within the meaning of the will, even though legitimated by the statute (C. L., §1876) on the marriage of the parents, and therefore did not take under that clause of the will.

OPINION OF THE COURT BY PERRY, J.

Action to quiet title. Theophilus Metcalf devised certain real estate to his son Frank, "to have and to hold to my said son, during the time of his natural life," adding, in his will: "And it is my further will that if my said son shall decease, leaving children lawfully begotten, that the property by this instrument

to him bequeathed shall descend to such heirs, but if he shall decease, not leaving lawfully begotten children as aforesaid, then the property so bequeathed to my said son shall be equally divided between my daughters Helen and Julia, should they both survive him, or to the survivor of them." The son Frank died leaving surviving him a son, Thomas, born in wedlock, and a daughter, Emma, conceived and born out of wedlock. Some time after Emma's birth her father and mother intermarried. The plaintiff acquired by deed all of the right, title and interest, if any, which Emma obtained under the will in and to the land referred to. The circuit court, trial by jury having been waived, gave judgment for the plaintiff for an undivided one-half of the land.

Two questions only, of those presented by the bills of exceptions, were argued. On behalf of the defendant Emma Nakuina, it is contended that by the clauses above quoted the testator gave to his son Frank an estate tail. We cannot so construe the will. Frank was intended to take a life estate only; the language used clearly expresses that intention. "Children," as used here, is a word of purchase and not of limitation, designating the persons who were to take after Frank's death, not from or through him by descent but under the will. The word "descend" is used in the sense of "go"; it is clearly used with that meaning in another clause of the will wherein the testator provides that certain property devised to a daughter shall, in the event of her dying not leaving heirs lawfully born, "descend" to the Trustees of Oahu College.

The other question is whether or not Emma took under the will as one of Frank's children "lawfully begotten". In our opinion, she did not. She was begotten at a time and under circumstances which undoubtedly made her conception unlawful. It is true that our statute (Section 1876, C. L.) provides that "all children born out of wedlock, are hereby declared legitimate on the marriage of the parents with each other and are entitled to the same rights as those born in wedlock," but this inheriting quality the statute gives to such issue in spite of the

fact that they are unlawfully begotten and born. It *declares* them legitimate and gives them the same rights possessed by those *born* legitimate but nevertheless recognizes and does not seek to alter the facts of nature. In the absence of a will, children *declared* legitimate by statute inherit equally with those *born* legitimate, but a testator may by express provision exclude all but those who are *begotten* or *born* lawfully. The words "lawfully begotten" in their ordinary acceptation describe facts as they exist at the time of conception. There is nothing in the will to indicate that they were used in any different sense. The testator's intent to confine his gifts to those only who were born in lawful wedlock is consistently shown throughout the will. In one instance, the devise is to a daughter "and to the heirs of her body, *in lawful wedlock born*," with a provision for the event of her dying, "not leaving heirs *lawfully born*"; in another, if certain daughters decess "leaving *lawfully born* children", such children are to take; and in still another the provision is as to the disposition of property in case of the death of either of two daughters "leaving children *born in lawful wedlock*."

In the *Appeal of Edwards*, 108 Pa. St. 283, 289, 290, a case similar to that at bar, the court held that a son born out of lawful wedlock, though legitimated by an Act of Assembly, could not take by purchase under a deed to "lawfully begotten children." The facts sufficiently appear from the following quotation from the opinion: "The persons who take the fund in court for distribution must do so as designated grantees under the deed from Elizabeth Wistar to Israel W. Morris in trust. The ultimate beneficiaries of the fee are there described as 'lawfully begotten children or grandchildren' of Richard M. Wistar, who was the son of Elizabeth Wistar and the *cestui que trust* for life of the property which produced the fund in court. The question is whether the appellee Thomas M. Wistar is a 'lawfully begotten' child of Richard M. Wistar. He is the illegitimate son of Richard M. Wistar and was legitimated by an Act of Assembly passed in April, 1853. There is no doubt that by force of this Act he became the heir of Richard M. Wistar and would be

capable of inheriting from him to the same extent as if he had been born in lawful wedlock. Under several of our decisions he could take under the description of 'issue', 'lawful issue', or 'person entitled under the intestate laws': *Killam v. Killam*, 3 Wr. 120; *Miller's Appeal*, 2 P. F. S. 113; *McGunnigle v. McKee*, 27 Id., 81; *Johnson's Appeal*, 7 Norr. 346. But the persons who take this fund do not take title from Richard M. Wistar. They must found their title upon the deed from Elizabeth Wistar to Israel W. Morris. It was she who created the estate and by the deed in question. She gave the property to Morris in trust for her son Richard M. Wistar during his life, and after his death to his 'lawfully begotten' children or grandchildren. We must regard this language as *descriptio personarum*. It describes the fact which shall characterize the ultimate beneficiaries. They must be 'lawfully begotten.' It is not enough that they have a legal status, that they may have inheritable blood from their father, that they may be his 'heirs', or his 'lawful issue.' Unless they are lawfully begotten children they do not fill the essential requirement of the deed of trust. It is undoubtedly true that Thomas M. Wistar was not 'lawfully begotten' by his father. It is equally true that it is not possible for any legislature to make that a fact which is not a fact. Legislation can confer legitimacy upon illegitimates, but it can not alter the facts of nature. In *Schafer v. Eneu*, 4 P. F. S. 304, we applied this doctrine strictly, holding that a devise over to 'children', after a life estate to their mother, would not embrace children who were adopted by the life tenant. We see no difference in principle between that case and this. Both are governed by the same idea. The ultimate takers of the estate do not derive their title by descent from their parent, but by purchase from the original grantor. In view of that consideration they must correspond to the description contained in the deed. Where that description defines merely a legal status it includes all who hold the status, but where it defines a fact, those only can claim its inclusion who conform to the fact. Thomas M.

Wistar is not within that category in this case, and therefore is not entitled to the fund."

The cases cited to the contrary are distinguishable by reason of the fact that the language used to describe the grantees or devisees is different in each instance from that in the case at bar. In *Ives v. McNicoll*, 59 O. St. 402, the devise was to M. for the term of his natural life and at his death to the "heirs of his body." M.'s heirs were ascertainable only at his death and the court properly held that a legitimated child, made capable, by law, of inheriting at M.'s death, was an heir. So, also, of *McGunnigle v. McKee*, 77 Pa. St. 81, where the devise was to T. and his "heirs". In *Carroll v. Carroll*, 20 Tex. 732, and *Gates v. Siebert*, 157 Mo. 254, the word used was "children." In the absence of indications to the contrary in the will, there was room for the construction that this meant all children whether born legitimate or made so by law. In *Miller's Appeal*, 52 Pa. St. 113, the description was "lawful issue" and the court held that a legitimated daughter was lawful issue within the meaning of the will, because, though not so by nature, she was made so by the supreme legislative power of the state. What the court would have decided had the testator limited the class to children lawfully *begotten*, does not appear.

The exceptions are sustained and a new trial ordered.

Robertson & Wilder for plaintiff.

Andrews, Peters & Andrade for defendant Emma M. Nakuina.

Kinney, Ballou & McClanahan for defendants Helen Rowland and James Prosser.

HONG QUON, LAM SAY KAN, LUM CHUNG WA, L. APANA, L. ALAI, TONG HUNG, TONG CHONG SOY, LEONG NAM, L. TUCK KONG and TONG CHONG WAI, partners under the name of Sing Chong & Co., v. CHEA SAM, KAM KUN, HO HIN, HO WA, LAM SAM CHIN, LAU FOO CHIN and LAM YING TAI, partners under the name of Lin Hop Wai Co.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 24, 1902.

DECIDED JUNE 6, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The record or a certified copy of a deed, duly recorded, is competent evidence where the original would be admissible. That the record or certified copy would tend to impeach the validity of the original deed, is not a good objection to its admission in evidence.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiffs sued in ejectment to recover the possession of 2 6-100 acres of land, Royal Patent No. 820, L. C. A. 8241 BB, situated at Waipio, Ewa, Island of Oahu, and for \$150.00 damages. The defendants who are in possession answered by filing a general denial. A jury trial was had and a verdict rendered for the plaintiffs for the possession of the premises and for \$81.50 damages. The defendants saved numerous exceptions and ask that the judgment be vacated on account of errors of law committed by the trial judge in admitting and excluding evidence.

The plaintiff to sustain the issue on their behalf introduced in

evidence, without objection, a certain deed from Yong Qui *alias* A. Kawai to A. Wai *et al.* dated January 5th, 1886, and recorded on the same day. The purpose of this evidence was to show that the land in controversy passed by that deed. The defendants in attempting to establish their defense offered in evidence the record of the deed, also a certified copy of the record from the Registrar of Conveyances for the purpose of showing that when the deed was recorded it did not contain a description of the land in controversy and that the deed had been changed or altered in a material part after its execution and record and that the defendants were innocent purchasers of the premises in dispute without notice.

This evidence was objected to "because it is incompetent, irrelevant and immaterial in that it seeks or purports, by the introduction of a certified copy of the record, to do away with the validity of the original document offered, and as such it cannot be introduced for the purpose of impeaching the original document which is recorded." This objection was sustained and the defendants excepted. This ruling was clearly erroneous. The record, also the certified copy of the deed was competent evidence for the reason that it is made such by statute. Section 1849, C. L., reads in part as follows: "The record of an instrument duly recorded, or a transcript thereof, duly certified, may also be read in evidence, with like force and effect as the original instrument."

In the case of *Foulke v. Bray*, 1 Wis. 104, the defendant in ejectment offered certified copies of certain muniments of his title and the plaintiffs objected to their introduction because the originals were in court. The objection was sustained. The Supreme Court held this to be error under the general rules of evidence as well as under the provisions of a statute similar to our own. See also *Meng v. Cohen*, (S. C.) 20, S. E. 62; *Woods v. Hildebrand*, 46 Mo. 284; *Burnett v. McCluey*, 78 Mo. 676, 687.

Again, this evidence was competent on other grounds. If the deed when executed did not contain a description of the

property in controversy, then title to it did not pass by the deed and the fact that the record, made the same day that the deed was executed, shows that this property was not included in the deed was strong evidence to establish the fact that the deed had been changed in a material part after its execution. It would further support the claim that the defendants were innocent purchasers without notice.

Mr. Justice Field, speaking for the Supreme Court of the United States, said on this subject: "The change in the description of the property, made after the delivery of the deed to the grantee and its record in the register's office of the country, did not give operation and force to the deed with the changed description as a conveyance of the premises in controversy. An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. The old execution and acknowledgment are not continued in existence as to the new property. To give effect to the deed as one of the newly described property it should have been re-executed, re-acknowledged and re-delivered. In other words a new conveyance should have been made."

"But if the deed as altered in its description of the property conveyed be deemed valid as between the parties from the time of the alteration, though not executed, it could not take effect and be in force as to subsequent purchasers without notice, whose deeds were already recorded, but as to them by the statute of Nebraska, it was void." *Moelle v. Sherwood*, 148 U. S. 21, 27.

The statute of this Territory, if possible, is in stronger terms than the statute of Nebraska, quoted in the above opinion, and reads as follows: "All deeds, leases for a term of more than one year, or other conveyances of real estate within this Republic, shall be recorded in the office of the Registrar of Conveyances, and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valu-

able consideration, not having actual notice of such conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." C. L., Section 1852.

Having determined that this ruling of the court was error, the next question presented is, was it reversible error, or of sufficient importance to justify this court in setting aside the verdict of a jury and ordering a new trial? We think that it was. If the defendants' contention is true and their evidence had been admitted and the jury found a verdict for them there would have been evidence sufficient to sustain the verdict. We cannot say that the jury would not have so found if the evidence had been admitted.

Several tracts of real estate and some personal property were attempted to be conveyed by the original deed and were described in a schedule endorsed thereon. A part of this schedule is as follows: "3. All those premises described in R. P. 820, L. C. A. 8241 *BB.* to *Koleaka*, 2 6-100 acres at *Waipio*, and conveyed to said grantor by deed of Aiona, Liber 60 page 157."

As quoted this schedule 3 describes the premises in controversy but the several figures, words and letters italicized are written in with pencil while the other parts of the instrument are written with ink. If the italicized words, figures and letters are omitted it will be seen that this schedule might be too uncertain and indefinite to convey anything.

It is contended on behalf of the defendants that the record and certified copy excluded by the court show that the italicized words and figures, the pencil additions, were not in the deed as recorded and that the blank spaces have been filled in by pencil since the execution and record. The physical appearance of this part of the deed gives strong color to the defendants' claim. It certainly requires some explanation to entitle it to full faith and credit.

The exceptions are sustained and a new trial ordered.

Cecil Brown and *Geo. A. Davis* for plaintiffs.

Andrews, Peters & Andrade for defendants.

JESSE MAKAINAI *v.* GOO WAN HOY.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED APRIL 25, 1902.

DECIDED JUNE 6, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Failure of consideration on the ground that no title passed by a warranty deed is no defense to an action on a note for the purchase money, so long as the vendee has not been evicted or obliged to pay off an incumbrance or otherwise injured.

The statutory provision that District Magistrates cannot try actions in which the title to real estate shall come in question, does not apply in such case.

OPINION OF THE COURT BY FREAR, C.J.

This is an action upon one of two notes of \$250 each given by the defendant to the plaintiff on account of the purchase price of certain land conveyed by the plaintiff to the defendant by warranty deed,—the balance of the purchase price, \$300, having been paid in cash.

The defense was failure of consideration because of defect or want of title. Defendant's counsel in this court assumes that the deed conveyed a good title to half the land, but the evidence seems to show that the claim in the lower court was that no title passed. The only testimony on this point—that of the defendant himself—was "that the title of the land is not good. A will was made by Peter Porter Kauhema giving this land to Uwini. I refused to pay the note because the title of the land is not good." The District Magistrate dismissed the case for

want of jurisdiction because, in his opinion, the title to real estate was involved. Civ. L., Sec. 1119.

It appears from the defendant's own testimony that he was in possession of the land at the time of the trial, that he had built a house on it and was receiving rent for it and that no action had been brought against him for the land. It does not appear even that his title had ever been questioned except by himself.

In our opinion, the District Magistrate should have retained jurisdiction on the ground that the defect or want of title, if any, could not be set up under the circumstances. "The doctrine is well established that where the grantee has been put in possession of land conveyed with covenants of warranty, and has not been ousted or otherwise disturbed in his possession, he cannot refuse payment of the purchase price according to his agreement by showing that some third person had title adverse to his grantor, even though he did not know of such adverse claim at the time he took his deed, if no fraud was practiced on him." *Jourolmon v. Ewing*, 80 Fed. R. 604, 610.

"The general principle * * * that mere absence of title will not, of itself, constitute a valid defence to the payment of securities given for the purchase money, has been very generally recognized throughout the United States, and, apart from local legislation or practice, it may be considered as settled that in cases free from fraud, the purchaser will not, when sued at law for the purchase money, be allowed to detain it, unless, in the case of a covenant against incumbrances, he has so paid the amount or otherwise suffered actual loss as to entitle him to present damages; or, in case of the covenants being those for quiet enjoyment or warranty, there has been an actual or constructive eviction." Rawle, Cov. for Tit., Sec. 333. See also 1 Randolph, Com. Paper, Secs. 545-547; *Patton v. Taylor*, 7 How. 132, 159; *Noonan v. Lee*, 2 Black 499; *Alger v. Anderson*, 92 Fed. R. 696, 713.

The appeal is sustained, the judgment appealed from set aside and the case remanded to the District Magistrate for further proceedings.

Achi & Johnson for plaintiff.

Holmes & Stanley for defendant.

APPEAL OF HENRY E. COOPER, Secretary of the
Territory.

APPEAL FROM THE AUDITOR.

SUBMITTED APRIL 21, 1902.

DECIDED JUNE 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The salaries appropriation act (1901, p. 43, Act 3, §3) provides that a person who holds more than one office shall not draw more than the salary of the highest if that amounts to \$1200 a year. The current expense act contains no such provision. Held,

This provision applies where the salary of one such office is payable under the former act and the salary of the other, under the latter act.

Within the meaning of this provision, deputy-sheriffs, public land agents and inspectors of election are officers, but public school teachers and clerks of election precincts are not.

OPINION OF THE COURT BY FREAR, C.J.

W. A. Ray, E. W. Estep and J. W. Moanauli served as inspectors of election in the First Representative District, Island of Hawaii, and Wm. Ragsdale Kamanao, as clerk of the Second Precinct in said District, at a special election held December 9, 1901. At that time Ray and Estep as principals of public schools, Moanauli as a deputy sheriff and Kamanao as a sub-agent of public lands, were each drawing from the government a salary at the rate of \$1200 a year. The question is whether they are entitled to pay as such inspectors and clerk respectively in view of the following provision of the salaries appropriation

act of 1901: "Section 3. No person holding more than one office shall be authorized to draw more than the salary of the highest grade of the office held by him if the salary of any office held by him shall amount to Twelve Hundred Dollars or more per annum, and he shall be entitled to no other compensation." The Auditor held this section applicable and declined to issue the necessary warrants. The Secretary appealed.

The salaries of the teachers, deputy sheriff and land agent are payable out of the salaries appropriation act above referred to, being Act 3 (p. 43) of the extra session. Their compensation as inspectors and clerk are payable, if at all, out of the appropriation for "expenses of election," under the Secretary's control, in the current expense appropriation act, being Act 4 of the same session,—they being entitled to \$10 each for the day's services, the inspectors by express provision (Civ. L. p. 824), the clerk by contract with the inspectors, they having employed him as necessary to the holding of the election. This case is of comparatively little importance in itself, but is said to be of greater importance because of other cases that arise from time to time involving the same principles.

1. As to Moanauli, it is clear that he was an officer as an inspector (Org. Act, §§64, 80; Civ. L., pp. 809-824) and also as deputy sheriff (Org. Act, §79; Civ. L., §§1032-1045; Laws of 1901, p. 48). The only question, therefore, as to him is, whether the section above quoted, which of course applies to his salary as deputy sheriff, the appropriation for which is made in the same act, applies also to his compensation as inspector, the appropriation for which is made in the next following act. It is stated that this section has been reenacted in appropriation bills at each session of the legislature for forty years, and that each appropriation bill is limited as to its duration: and it is contended that the section in question has not the effect of general legislation but is limited in its operation to other parts of the same act. It may perhaps be a question whether this provision is of a more permanent nature than the rest of the act (see, however, *U. S. v. Mouat*, 124 U. S. 303), but, assuming that it is not, it does not

follow that it has no application to a case in which one of the salaries is payable under another act covering the same period and passed at the same time. The language is very general—"no person holding more than one office shall," etc., "if the salary of any office held by him shall," etc., "and he shall be entitled to no other or further compensation." But the letter and the reason of the provision would seem to apply to all cases in which more than one office is held by one person. It would seem at least to apply where one of the salaries is provided for in the same act.

It is contended that executive usage and custom support the contention of the appellee, inasmuch as officers in receipt of salaries up to the statutory limit have repeatedly been compensated for extra services not required of them as such officers. In the enumerated instances the compensation was paid to such persons as mere employees and not as officers, and so such cases are distinguishable from this case.

2. As to Kamanao, he was an officer as land agent (Civ. L., §192 *et seq.*; Laws of 1901, p. 56), and the crucial question is, whether he was also an officer as clerk of the election precinct. There is no definition that can be applied to all cases as to what constitutes one an officer. But in our opinion one is not an officer where, as in this instance, the law does not recognize him by providing for his appointment or his pay or his duties or in any way, but he is engaged by other officers to temporarily assist them and is paid according to his contract with them out of an appropriation for general expenses. He was a mere employee. See Mechem, Pub. Of., Ch. 1.

3. As to Ray and Estep, they were officers as inspectors, but were they officers as principals of public schools? This is a question upon which there might be some difference of opinion. Their status in this respect is the same as that of teachers. That would naturally be the case and the statute recognizes it. Civ. L., §110. Possibly teachers are within the reason of the law, though that is not altogether clear. But they do not appear to be within its letter, and it would be unsafe to speculate on the

intention of the legislature. In our opinion, public school teachers are not officers or holders of offices within the meaning of the statute. They are employees. They are not appointed strictly speaking. They are not required to take an oath of office or to give a bond. Their duties are determined for the most part by the Department of Public Instruction rather than by law. Their relation to the public or to the department is rather contractual than official. Their salaries are not specifically provided for by law, but are paid along with other expenses out of a general appropriation in such amounts and at such times as the Department determines. Laws, 1901, p. 56. They do not exercise sovereign functions. See Civ. L., §§107, 110, 111, 113, 119, 124, 125; P. L., §§1391-3. Public school teachers are not generally considered officers elsewhere. *Seymour v. Over-River School District*, 53 Conn. 502; *Butler v. Regents*, 32 Wis. 124; *Commonwealth v. Board*, 187 Pa. St. 70 (41 L. R. A. 498).

Our opinion is that the Auditor properly declined to issue a warrant for the inspector Moanauli but erroneously declined to issue warrants for the other inspectors and the clerk.

Judgment accordingly.

Secretary H. E. Cooper in person.

Attorney-General E. P. Dole for the Auditor.

THE TERRITORY OF HAWAII v. WILLIAM SAVIDGE,
HARRY JUEN and J. H. SCHNACK.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 25, 1902.

DECIDED JUNE 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

One who is out of possession of real property, though entitled thereto, may not, taking the law into his own hands, recover such possession by force.

One who is in the actual peaceable possession of real property, may defend that possession by the use of such force as may be reasonably necessary for that purpose.

What is actual peaceable possession within the meaning of this rule, is to be determined in view of the circumstances of each particular case.

Where an illegal sentence has been imposed, the case may be remanded to the trial court for the imposition of a legal sentence.

OPINION OF THE COURT BY PERRY, J.

The defendants were tried before a jury upon a charge of assault and battery and convicted. The bill sets forth a number of exceptions.

The case for the prosecution was, briefly, that one Kamakee (w), the complaining witness, was in possession of a certain dwelling-house and land situate in Honolulu and that the defendants entered upon and forcibly removed her from the premises and dispossessed her. The evidence adduced, while it would support a finding that the defendants used force in removing

the complaining witness, would not support a finding that they or any of them used any more force than was reasonably necessary to accomplish that purpose.

In direct examination the complainant referred to the house and land as her own and testified, among other things, that she had lived there twenty years and over. The following questions were asked her on cross-examination: "Don't you remember of giving Kahanuapo a deed of this land in 1889?" "Did you deed your property away in 1889?" "Now, madame, have you any recollection of having disposed of that land?" Objections to these questions were sustained; exceptions 1, 2 and 3 are to these rulings. Exception 7 is to the ruling sustaining the objection to the following question asked of another witness for the prosecution: "So the old lady, when she was being taken out, as you say, made the remark that the land was hers, that she had been robbed of it by Kahanuapo. Now, who is this Kahanuapo?" Exception 11: Defendant Schnack in direct examination, in answer to the question, "Who was the owner of that property?" said, "I am." This testimony was objected to and the objection sustained.

In support of these exceptions it is contended that the defendants were entitled to show that at the time of the alleged assault they, and not the complainant, were in the actual peaceable possession of the premises and were therefore justified in using all necessary force in defending that possession from interference by the complainant. Assuming this contention to be good, still the exceptions under consideration cannot be sustained on that ground. The questions asked and the testimony excluded were not directed to the issue as to the actual peaceable possession but solely to that of title. Moreover, taking the defendants' view of the facts and assuming that they had been in possession through their tenants until a few months prior to the date of the alleged assault, it appeared from Schnack's own evidence that some time prior to the date in question he had made a trip to the mainland for the benefit of his health and that shortly before leaving he learned that some natives, pre-

sumably the complainant and those under her, were living on the property but took no action at the time because his time was limited and so as not to "put himself out." On counsel's statement of the facts desired to be proved, Schnack was out of the Territory for some months and during all of that time complainant lived on the premises. Who has the actual peaceable possession of a dwelling-house, is a question to be determined in view of the circumstances of each particular case and may, under some circumstances, be a difficult one to determine. In this case, however, we think that, upon the facts desired to be proved, the complainant was in the actual peaceable possession of the premises within the meaning of the rule under discussion.

As cross-examination of the complaint as to the length of her possession, the questions asked her might, in the discretion of the trial court, have been properly allowed as leading up to questions on the subject of the actual possession; still in the absence of any such further attempted cross-examination it cannot be held that their exclusion was prejudicial error.

On the subject of the title, the more enlightened and the well recognized rule, is that, while one who is rightfully in possession may defend that possession by the use of all necessary force, one who is out of possession, though entitled thereto, may not, taking the law into his own hands, recover it by force. "The law does not justify the owner of real or personal property in taking possession of it by his own act, from another, unless he can do so without violence or a breach of the peace."—*Corey v. The People*, 45 Barb. 262. "Such is the claim of right set up by these pleas; a claim manifestly opposed to the fundamental principles of civil government. The law does not allow any one to break the peace and forcibly redress his private wrongs. He may make use of force to defend his lawful possession, but, being dispossessed, he has no right to recover possession, by force, and by a breach of the peace. * * * This principle applies to the possession and dispossession of personal property, and ought especially to be rigidly observed in relation to a man's dwelling-house, in which he is peculiarly protected

by the law.”—*Sampson v. Henry*, 11 Pick. 379, 387. “Admitting the defendant had such right” (to the possession) “it most clearly would not justify him in committing an assault and battery upon the plaintiff for the purpose of reducing his right to actual possession. If he had the possession in fact, the law would justify him in using violence, if necessary, in order to defend his possession; and so the jury were instructed. It cannot be necessary to refer to authorities for the purpose of establishing these propositions.”—*Parsons v. Brown*, 15 Barb. 590, 593. See also *Railway v. Harris*, 122 U. S. 597, 606, 607; *Railroad v. Johnson*, 119 U. S. 608, 611.

Exception 10 was to the refusal of the trial court to permit a witness for the prosecution to be asked what interest he had in the property in question, the object of the cross-examination being to show bias on the part of the witness. The witness had already stated that he had an interest in the land. Under all of the circumstances of the case we think that the error, if any, was not prejudicial or reversible.

Exception 16 is to the denial of a motion for a new trial based on the ground of misconduct on the part of one of the jurors. The facts constituting the alleged misconduct were supported by the affidavit of but one person and were denied by the juror on affidavit. We cannot say that the juror was satisfactorily shown to be disqualified or that the trial court erred in denying the motion.

Defendants Schnack and Juen were each sentenced to imprisonment for twenty days, without hard labor. This was error. The statute does not permit such a sentence, but requires either a fine or imprisonment at hard labor. See Penal Laws, Section 63. That where such an error has been made we may remand the cause to the trial court with directions to impose a new and legal sentence, was decided in the case of *Territory v. Poloaiea*, 13 Haw. 335, 337.

The exceptions not herein considered have been abandoned.

The sentences of the defendants Schnack and Juen are set

aside and the case remanded to the Circuit Court of the First Circuit for the imposition of legal sentences upon the two defendants named, or for such other proceedings as may be proper.

Deputy Attorney-General Cathcart and J. M. Davidson for the prosecution.

Kinney, Ballou & McClanahan for the defendants.

LEWERS & COOKE, Ltd. v. J. W. REDHOUSE.

APPEAL FROM SECOND DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED JUNE 12, 1902.

DECIDED JUNE 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The provision of the Federal Constitution conferring the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars, is sufficiently complied with in cases within the jurisdiction of District Magistrates under our statutes if a trial by jury is allowed on appeal in the Circuit Court.

An entire claim cannot be split for the purpose of bringing separate actions on the different parts within the jurisdiction of an inferior court.

The amount for which judgment is asked and not the amount due determines whether the case is within the jurisdiction of the court.

A portion of an entire claim may be waived for the purpose of bringing action on the balance within the jurisdiction of an inferior court.

An ordinary continuous running book account is such an entire claim as cannot be split for the purpose of bringing several actions on the different parts.

If action is brought on a part only of an entire claim, the rest will be deemed to be waived.

If action is brought on a part of an entire claim, the part being within

and the whole being beyond the jurisdiction of the court, the result will be, not that the court will not have jurisdiction, but that the judgment will bar further action on the balance of the claim.

Semble, that attorney's commissions and costs allowed by statute, though prayed for, should not be included in determining whether the amount sued for is within the jurisdiction of the court, but Interest, whether allowed by the terms of the contract or by law as damages for the detention of money, should be included if prayed for.

While interest may be waived either expressly or by omission to pray for it, so as to bring a case within the jurisdiction of an inferior court, or, if not prayed for, may be remitted in case the judgment includes it, yet, if prayed for and allowed in the judgment, the error cannot be cured by remitting the excess beyond the jurisdictional amount, since the court never acquired jurisdiction over the case and its judgment is absolutely void.

The question of want of jurisdiction may be raised in this court although the record of the lower court does not show that it was raised there except in the notice of appeal filed after judgment was rendered.

OPINION OF THE COURT BY FREAR, C.J.

Several questions are raised on this appeal on points of law from the District Magistrate.

1. That the Magistrate was without jurisdiction to try the case for the reason that the 7th Amendment to the Federal Constitution confers the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars, and that in this case such value did exceed such amount and that there is no jury in the District Court. This constitutional provision is sufficiently complied with if, as is the case here, a trial by jury is allowed on appeal to the Circuit Court. *Capital Traction Co. v. Hof*, 174 U. S. 1.

2. That the District Magistrate was without jurisdiction because the plaintiff's claim exceeded the amount over which the Magistrate had jurisdiction. The action was for \$297.39 (besides interest and costs) on book account for goods sold and delivered, but it appeared by the plaintiff's own evidence that the total balance due on the account was \$367.63 and that this

had been split for the purpose of bringing the case within the jurisdiction of the Magistrate, which extends to \$300 only. It is contended that a claim cannot be split for such purpose.

The prevailing rule is that an entire claim cannot be split for the purpose of bringing several actions on the different parts within the jurisdiction of an inferior court. This rule is based upon the maxims that it is for the public good that there be an end of litigation and that no one ought to be twice vexed by one and the same cause. But what is the result if an action is brought on a part only of the cause? Is it to oust the court of jurisdiction or is it merely to prevent a second action upon the balance of the cause?

It is settled that the amount prayed for and not the amount due determines whether the case is within the jurisdiction of the court; also that one may waive a portion of his claim in order to bring his action within the jurisdiction of an inferior court. *Volcano S. & T. Co., v. Hayashi*, 13 Haw. 695.

The questions then arise, whether a claim for the balance due on a running book account for goods sold and delivered from time to time is an entire claim such as cannot be split for the purpose of bringing different actions on the different parts, and, if it is, whether there has been a waiver of the part not embraced in this action?

Although a book account with one concern may be separable, if the circumstances are such as to show such intention, as where the concern carries on different lines of business and keeps separate books for each line, or perhaps where the account has been broken for a long period even though but one set of books has been kept, yet the prevailing view is that an ordinary running account though covering many different items cannot be split. *Lucas v. Le Compte*, 42 Ill. 303; *Buck v. Wilson*, 113 Pa. St. 430; *Memmer v. Carcy*, 30 Minn. 458; *Borgesser v. Harrison*, 12 Wis. 544; *Secor v. Sturgis* 16 N. Y. 548; *Flaherty's Admr. v. Taylor*, 35 Mo. 447. The same rule seems to apply to cases of different instalments of interest or rent. While different actions may be brought on different parts

from time to time as they come due, yet each action must cover all that are then due or those not included will be deemed to have been waived. It is not necessary that there should be an express waiver of the part not included. Indeed, it may not appear at the time that a part has been omitted. But, if it is intentionally omitted or not claimed though appearing to exist or even though there appears an intention not to waive it, the party will be barred from subsequently bringing another action upon it. Cases *supra* and *Litchfield v. Daniels*, 1 Colo. 268; *Bowditch v. Salisbury*, 9 Johns. 366; *Cahill v. Dolph*, 1 Johns. Ces. 333; *Sanborn v. Contra Costa County*, 60 Cal. 425; *Butcher v. Smith*, 29 Oh. St. 600; *Hapgood v. Doherty*, 8 Gray 373; *Remington v. Henry*, 6 Blackf. 63; *Carey v. Miller*, 12 R. I. 337; *Reformed, &c., Church v. Brown*, 54 Barb. 191; *Un. R. R. & Tr. Co. v. Traube*, 59 Mo. 355; *Nickerson v. Rockwell*, 90 Ill. 460.

3. That the District Magistrate was without jurisdiction because the action was for an amount in excess of his jurisdiction, which is limited to \$300. The prayer was for "\$297.39 damages, with interest, and costs." It is contended that the interest amounting to \$16.95, added to the principal, made the total over \$300.

Attorney's commissions and costs allowed by statute should not, we presume, be included in determining the jurisdictional amount. They are not a part of the claim or of the amount sued for. They are incidental to the action itself. They are not due and could not be claimed until the termination of the action. But as to interest, it is different. Although there are authorities *contra*, the great weight of authority is to the effect that interest should be included in determining the jurisdictional amount. That such should be the rule on principle is clear when the interest is provided for in the contract, for it is just as much a part of the claim as the principal is. And the same is true where, as in this case, the interest is merely allowed by law and may be considered as in the nature of damages. This also is part of the amount claimed, as much so as would be a claim for damages for the detention of specific property.

And it is so held. *State v. Superior Court*, 9 Wash. 369; *Plunket v. Evans*, 2 S. D. 434; *Howell v. Burnett*, 20 N. J. L. 265; *Parkhurst v. Spalding*, 17 Vt. 527; *Paige v. Morgan*, 28 Vt. 565; *Kirk v. Grant*, 67 Md. 418 (10 Atl. 230); *Ball v. Biggam*, 23 Pac. (Kans) 565.

But may not the want of jurisdiction be restored by permitting the plaintiff to remit the amount in excess of the jurisdiction to the District Magistrate? If the claim had been for a sum within that jurisdiction, and the judgment for a sum in excess of it, the error could be cured by remitting the excess, for the Magistrate would have had jurisdiction of the case but would merely have erred in its judgment, which error could be corrected on appeal. But since in this case the action itself was for an amount above \$300, the Magistrate never acquired jurisdiction of the case and his judgment was absolutely void. *Plunket v. Evans*, *Supra*. See also *McQuade v. O'Neill*, 15 Gray 52; *Hearn v. Cutberth*, 10 Tex. 216; *Quayle v. Glen*, 57 Pac. (Ida.) 308. This would seem to follow from the general rule that where an inferior court has no jurisdiction, an appellate court cannot entertain an appeal except for the purpose of reversing the judgment below, or affirming it in case that court has dismissed the action for want of jurisdiction.

It is true that on most of these points there is considerable contrariety of opinion, but the foregoing views seem to be in harmony with reason and the weight of authority. For further authorities see note to *Hunton v. Luce*, 28 L. R. A. 221; 1 Enc. Pl. & Pr. 53-5, 707 *et seq.* and notes; 31 Cent. Dig. 1027 *et seq.*

This being a question of jurisdiction over the subject matter, it may be raised in this court on appeal, even though the record of the district court does not show that it was raised there except in the notice of appeal filed after judgment was rendered. See *Tong On v. Tai Kee*, 11 Haw. 424; *Wedgewood v. Parr*, 112 la. 514.

It is unnecessary for the purposes of this case to decide all the foregoing questions, but as they are closely related and most of those not here involved are involved in other cases now be-

fore the court and about to be decided, it was deemed best to consider all these questions in one opinion.

The judgment appealed from is reversed on the ground that the *ad damnum* for principal and interest exceeded the amount over which the District Magistrate could take jurisdiction, and the case is dismissed without prejudice.

Peterson & Matthewman for plaintiff.

J. T. De Bolt for defendant.

SARAH PHILLIPS, M. GREEN and M. PHILLIPS, partners under the name of M. PHILLIPS & CO. v. LEE CHONG, LEE LET, LEE TAI, LEE YOUNG, LEE TUN, LEE PENG, WONG SHUEY KING and YOUNG TONG, partners under the name of THE LUN CHONG COMPANY, defendants, and J. H. Fisher, Garnishee.

SAME v. SAME.

APPEAL FROM SECOND DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED JUNE 12, 1902.

DECIDED JUNE 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When an appeal bond is made out to the court instead of to the clerk, the remedy is not to dismiss the appeal but to order an amendment of the bond, under Civ. L., § 1459.

Points of law on appeal from a District Magistrate held set out with sufficient clearness under the circumstances.

Leivers & Cooke v. Redhouse, ante 290, followed as to the splitting of

claims so as to bring them within the jurisdiction of a District Magistrate.

When a claim is split for such purpose, the proper course is to show in the second action that the claim has been adjudicated in the first action, and not to object to the jurisdiction of the court on the ground that the claim sued on is only a part of a larger claim, irrespective of whether the balance has been adjudicated or sued on.

OPINION OF THE COURT BY FREAR, C.J.

These are two actions of assumpsit between the same parties. Similar questions being involved in both cases, they were heard together in this Court.

The plaintiffs first moved that the appeal be dismissed on the grounds (1) that the appeal bond ran to the Supreme Court instead of to the Clerk, and (2) that it was not stated clearly and concisely in the appeal what adverse rulings were appealed from.

This motion was overruled at the hearing so far as the first ground was concerned and the defendants were ordered to file an amended bond. Civ. L. §§ 1459, 1460; *Wright v. Brown*, 11 Haw. 401; *Murray v. Colburn*, 9 Haw. 424.

As to the other ground, the certificate of appeal in the first case sets out with ordinary clearness and conciseness several points of law upon which the appeal is taken. In the second case, it refers for the points of law to an annexed paper. This paper sets forth briefly a statement of the facts, the action taken by the defendants and the ruling of the Magistrate in respect of each of several questions that were raised in the case, without stating briefly in general terms the mere propositions of law relied on by the defendants. This was sufficient. The points of law appear more clearly than they did in *Hamburg v. Namura*, 13 Haw. 702, in which the statement of the points of law was held sufficient.

Several questions were raised upon the merits. One is that the Magistrate was without jurisdiction because the claim exceeded the amount of \$300, the limit of his jurisdiction. It seems that the actions were for \$201.53 and \$176 respectively

(besides interest and costs), these being the totals of different parts of a single continuous running account for goods sold and delivered. The defendants first presented a plea in bar which was overruled. So far as appears there was nothing at that stage in either case to show that the amount sued for was only a part of a larger claim. Upon the plaintiffs' closing in the first case, the defendants moved for a nonsuit on the ground that the court had no jurisdiction, as the account sued on was only a part of a larger continuous account exceeding \$300, and that the plaintiffs had not waived the balance. In the second case it was stipulated that the evidence and plea in bar, as it is called, would be the same as in the first, thus placing the two cases upon the same footing. Defendants' counsel in his brief emphasizes the contention that the Magistrate was absolutely without jurisdiction because, although a part of the claim might have been waived, it was not waived, and the total account exceeded \$300. This contention was made in the lower court, as it is here, in each case entirely irrespective of the question whether the balance had been sued upon in the other case or whether judgment had been given for a part of the entire account in one case.

In *Leivers & Cooke, Ltd., v. Redhouse*, ante 290, we have just decided that, although an entire claim like that here involved cannot be split for the purpose of bringing different actions on the different parts within the jurisdiction of an inferior court, yet the bringing of an action on a part is not forbidden, but merely bars the right to bring another action on the balance of the claim, on the principle that the whole claim will be deemed to have been settled in the first action, the part not sued for therein being deemed to have been waived. Accordingly the Magistrate had jurisdiction in the first of these actions and the proper course for the defendants to have pursued was to plead or show in the second action that the whole claim had been settled in the first action.

But the defendants did not do that. They merely objected in the second action that the Magistrate did not have jurisdiction, because the claim sued on was a part only of a larger

claim exceeding \$300, and irrespective of whether the rest of the claim had been adjudicated or even sued on in the first case. The Magistrate had jurisdiction of the second action even though the claim which was the subject of that action had been previously adjudicated. It was the defendants' privilege to plead the previous adjudication or not, as they pleased. They did not do so. If they had done so, the Magistrate would not have lost jurisdiction. He could not dismiss the case for want of jurisdiction. He would retain jurisdiction but give judgment for the defendants on the merits of the case on the ground that the proofs showed that nothing was owing by them to the plaintiffs. We make no point as to whether the defendants made the proper motion—whether it should have been for dismissal, nonsuit or judgment. The point is this: The defendants moved for a nonsuit on one ground. The Magistrate decided that he could not grant a nonsuit on that ground. In that he did not err. The defendants did not ask for it on any other ground. It was at their option to do so or not.

As to the garnishee, it is contended first that the evidence does not show that the partnership to which the garnishee was indebted was the same as that composed of the defendants herein. The evidence is not clear on this point but probably would justify the Magistrate's finding of identity as a fact. However, it is unnecessary to decide this. For, it is further contended, and in our opinion correctly, that under our statute of garnishment a debt owing by a third party to a defendant which did not accrue until after service of process upon the garnishee, which was the case here, cannot be held. Such is the general rule elsewhere, but that is of little consequence when we consider the variety of statutes on this subject. Under some statutes it is held that debts accruing between service and answer may be held. Our own statute is very uncertain and to some extent inconsistent on this point. The most important references in the statute to the time when the debt must be owing, taken by themselves, would seem clearly to apply only to such debts as are owing, though not necessarily payable, at the time of service. The statute starts out (Civ. L., § 1710) by

giving the right to garnish "when debts are due from any person to a debtor," not "when debts are likely to become due," and in the same section it provides that "from the time of" service, "every debt due from such debtor to the defendant, shall be secured," &c., and in the next section that, "if such debtor shall not pay to the officer, when demanded, the debt due to the defendant at the time the copy of the writ was left with him, such * * * debtor shall be liable," &c. In section 1720 the garnishee is permitted to come in and be examined before the return day, instead of at the return day, in which case, of course, he could not be held as to any debts that might accrue thereafter but before the hearing. But in section 1710 it is provided that he shall be summoned to "disclose whether he has, or at the time said copy was served, had any of the goods," &c. "or is indebted," and in the two following sections there are similar uses of the present tense with reference to the time of disclosure. But perhaps these can be explained in connection with the other clauses on the theory that, as the debt was to be secured from the time of service, it was assumed that a disclosure of debts owing at the time of examination would disclose debts at the time of service or at least aid in ascertaining what debts there were then. The use of the present tense with reference to the time of disclosure cannot be taken literally, for that would carry us too far, as, for instance, in the provision at the end of § 1712, that if the disclosure shows that the garnishee "is not so indebted, then judgment shall be given for him." If that meant not indebted at the time of examination only, it would enable the garnishee to defeat the object of the statute by payment of his debt after service but before examination. But, as already pointed out, the only positive provision of the statute for holding a debt in case one is disclosed, is that in § 1711, which makes the garnishee actually liable only as to "the debt due to the defendant at the time the copy of the writ was left with him."

The judgment is affirmed as against the defendants and reversed as against the garnishee, and the latter is discharged.

Peterson & Matthewman for plaintiffs.

Russell & Watson for defendants.

Robertson & Wilder for the garnishee.

C. MING HYM *v.* YOUNG TONG, defendant, and J. H. FISHER, garnishee.

APPEAL FROM SECOND DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED JUNE 12, 1902.

DECIDED JUNE 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The certificate of the District Magistrate that an appeal was duly noted, etc., on certain points, enumerating them, is sufficient to show that the points were raised in his court.

A debt owing to a partnership cannot be garnished in an action against one of the partners.

OPINION OF THE COURT BY FREAR, C.J.

In this case as in that of *M. Phillips & Co. v. Lun Chong Co.*, ante 295, argument was heard on a motion to dismiss and on the merits. Several of the questions raised were the same in both cases, but in this case the following additional questions were raised.

On the motion it was contended that it should be made to appear that the point of law appealed upon was raised in the Magistrate's court, and that it is not sufficient for the certificate to say that certain points are relied on in the notice of appeal.

In this case the Magistrate certifies that an appeal was "duly noted * * * upon the following points," and then sets out the points. This was sufficient. *Afong v. Kaala*, 7 Haw. 521; *Rep. v. Kanalo*, 11 Id. 435.

As to the garnishee, there was the same testimony as in the other case. But here only one of the partners was defendant. Although a debt owing to one partner may be garnished in an action against the partnership, and some authorities hold that a debt owing to the partnership may be garnished in an action against one of its members, the weight of authority on the latter question is the other way. *Stellings v Young*, 161 Mass. 287; *Gale v. Barnes*, 66 N. H. 183; *Sweet v. Read*, 12 R. I. 121; *Myers v. Smith*, 29 Or. St. 120; *Bartlett v. Woodward*, 46 Vt. 100; *Dawson v. Railroad Co.*, 97 Mich. 33.

The judgment appealed from is affirmed as to the defendant and reversed as to the garnishee and the latter is discharged.

Peterson & Matthewman for plaintiff.

Russell & Watson for defendant.

Robertson & Wilder for garnishee.

S. AHMI v. W. H. CORNWELL, Jr.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED JUNE 12, 1902.

DECIDED JUNE 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under Act 40 of the Laws of 1898 an exception to an order granting a new trial in a term case may be certified to the Supreme Court by the presiding judge, whenever such judge in his discretion may think the same advisable for a speedy termination of the case.

An order of the trial judge granting a new trial may be set aside, in a

case where there was ample evidence to support the verdict of the jury, and no sufficient cause for the order exists.

OPINION OF THE COURT BY PERRY, J.

Action for malicious prosecution. The jury rendered a verdict for the defendant. The plaintiff thereafter moved for a new trial on the ground that the verdict was contrary to the law and the evidence and the weight of the evidence and the motion was granted. To this order granting a new trial the defendant excepts.

The plaintiff in this court moves that the exception be dismissed on the ground that the order granting a new trial is interlocutory and that no exception lies thereto, citing in support of his contention *Barthrop v. Kona Coffee Co.*, 10 Haw. 398, wherein it was held that an appeal or exception cannot be brought directly to the Supreme Court from an interlocutory decision. The defendant opposes the motion on the ground that in such cases as that at bar the practice has long been established to the contrary. Whatever force the last mentioned consideration may be entitled to, and assuming that the order in question is interlocutory, there is a better reason for denying the present motion and that is that in 1898, after the decision in the case of *Barthrop v. Kona Coffee Co.* was rendered, a statute was passed (see Act 40, Laws 1898) specifically providing that "bills of exception * * * may be certified to the Supreme Court from decisions overruling demurrers or from other interlocutory orders, decisions or judgments, whenever the judge in his discretion may think the same advisable for a more speedy termination of the case." The record in this case shows that the trial judge allowed the exception and bill of exceptions in question.

As to the exception on its merits. While it is true that as held in *Macfarlane v. Lowell*, 9 Haw. 438, "a motion for a new trial which is not founded upon error of law, is addressed to the judicial discretion of the trial court," and that "a stronger case must be made for interfering with the exercise of such

discretion where a new trial has been granted than where it has been refused," still it is also true that where such discretion has been abused the appellate court may interfere. In the case at bar, we think that there was an abuse of discretion. One of the defenses relied upon in the trial below was that the defendant, in causing the arrest of the plaintiff, in good faith and without malice sought and acted upon the advice of counsel in good standing given after a full and fair disclosure to such counsel of all the facts and evidence within the defendant's knowledge. Ample evidence was adduced tending to support this defense. In view of the verdict rendered, the presumption is that the jury found it established to its satisfaction. It may be that the trial judge thought that the verdict should have been for the plaintiff, and it may also be that that view would find support in the evidence. The matter, however, was peculiarly one for the determination of the jury and, clearly, no sufficient cause appeared for disturbing its finding or verdict.

The exception is sustained and the order granting a new trial set aside.

The exception is sustained and the order granting a new trial set aside.

J. L. Coke and Kinney, Ballou & McClanahan for defendant.

TERRITORY OF HAWAII *v.* ANTONE MARTIN.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED JUNE 16, 1902.

DECIDED JUNE 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Indecent exposure in a public place, where it may be seen by others if they pass by, is, even though actually seen by one person only, punishable under Section 324 of the Penal Laws.

OPINION OF THE COURT BY PERRY, J.

The defendant was found guilty by the District Magistrate of the offense of common nuisance in the first degree by making an indecent exposure of his person in a public place, to wit, the Beach Road in Honolulu. The only point of law appealed on is that the judgment is contrary to the law and to the evidence and to the weight of the evidence. The evidence adduced is sufficient to support a finding that at the time charged the defendant made what was undoubtedly an indecent exposure of his person to a girl twelve years old and that this was accompanied with solicitations to permit intercourse with her; that the parties were then behind a pile of lumber near a public highway, but in view, nevertheless, of any one who might pass along the road; that the girl had gone there somewhat reluctantly in consequence of defendant's importunities; and that one person only, other than the defendant and the girl, to wit, the father of the girl, approached the place referred to while they were there. Whether or not the girl's father was in a position

to see before the exposure ended, is not entirely clear from the evidence, but the evidence was, perhaps, sufficient to sustain a finding that he could have seen. However that may be, it may be assumed that the exposure was to or in the view of the girl only. The contention on behalf of the defendant is that, in such a case, the offense of common nuisance is not established and that it is an essential element of the offense that the act be done in a public place and in view of more than one person. The place where the act was done was a public one. See *Republic v. Ben*, 10 Haw. 278, 280. Whether it is necessary to constitute the offense that it be committed in a public place, we need not, therefore, say. The question of whether the exposure to be punishable as a common nuisance must be to or in view of more than one person, is one of construction of our statute. Decisions rendered in cases where the charge was of a common law offense can be of but little assistance. Similarly, of those based on statutes different from ours. Under the latter class would fall *Com. v. Wardell*, 128 Mass. 52 and *St. v. Millard*, 18 Vt. 574, where the statutory provision was that, "if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, every such person shall be punished, * * *." In these two cases it was held that the word *open* was descriptive of the nature of the act, as opposed to *secret*, and not of the place.

Our statute (section 324, Penal Laws) reads as follows:

"The offense of common nuisance is the endangering of the public personal safety or health, or doing, causing, or promoting, maintaining or continuing what is offensive to the public, or is annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty and good habits of the people, the same being without authority or justification by law.

"As, for example, * * * open lewdness or lascivious behavior, or indecent exposure."

The legislature has itself cited indecent exposure as an example of what it sought to define as common nuisances in the first paragraph of section 324. In our opinion when the inde-

cent exposure is in a public place where it may be seen by others if they pass by, it is such as is contemplated by the statute even though it is actually seen by one person only.

The appeal is dismissed.

E. A. Douthitt, Assistant Attorney-General, for prosecution.

J. T. De Bolt for defendant.

WILLIAM A. HALL *v.* C. WINAM.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 13, 1902.

DECIDED JULY 1, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Where two persons stand in such a relation that confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantageous agreement at the expense of the confiding party, the one so misusing his position will not be permitted to retain the benefit, although the agreement or contract could not have been impeached if no such confidential relation had existed.

A contract entered into between an inexperienced young man, with little business ability and meager knowledge of the value of money or property and an experienced and capable business man, without independent advice and for an inadequate consideration, the weaker confiding in and trusting the stronger to protect his interest, will be annulled and cancelled by a court of equity at the suit of the dependent party.

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal from the decree of a Circuit Judge of the First Circuit annulling and cancelling a lease, executed between the plaintiff and the defendant, on the grounds of undue influence and inadequacy of consideration.

It appears from the evidence that the plaintiff's father, Edwin J. Hall, owned 6.794 acres of land located within the business section of Honolulu and that he leased all of this property for a term of 15 years ending in July, 1906, for a yearly rental of \$1,000.00, the lessee paying all taxes, water rates and assessments that might be laid against the premises during the term; that the defendant acquired this lease by assignment in the year 1897 and entered into possession; that prior to his death and after the execution of this lease Edwin J. Hall deeded this property to his two minor children, the plaintiff and his sister, an undivided one-half interest to each; that for more than four years prior to his coming of age the plaintiff's person and property were in the care of a guardian; that he lived with a relative and was allowed \$12.50 per month for school and clothes; that he was married at 17 and after his marriage the allowance was increased to \$25.00 per month; that for several years thereafter this amount seemed to be ample to supply the wants of the plaintiff and his family; that about 1897 the plaintiff became acquainted with the defendant as his tenant; that this acquaintance was carefully cultivated by the defendant, he paid social visits to his home and extended little courtesies until the plaintiff came to look upon the defendant as his best friend and adviser; that after this acquaintanceship had ripened into a warm friendship and about one year before plaintiff came of age the defendant secured from him a lease for his one half of the premises, the term commencing at the expiration of the lease made by Hall, Sr., in 1906, for a rental of \$750.00 per annum; that it was agreed between the parties that the lease should be kept secret; that plaintiff's wife finally discovered it and carried it to his guardian who summoned the parties before him and after scold-

ing the plaintiff for his folly in making the lease and warning the defendant that he had no right to make a lease with a minor, destroyed the same in the presence of the parties; that a short time prior to the execution of this cancelled lease the plaintiff commenced to borrow money of the defendant; that the defendant advanced money to the plaintiff from this time until after the execution of the lease in question, February 24, 1901, on his unsecured note, whenever requested to do so, in amounts ranging from \$5.00 to \$150.00 dollars; that after plaintiff discovered that he could obtain money so easily he entered upon a career of the "fast young man" and spent money recklessly and foolishly; that plaintiff's wife begged the defendant not to let the plaintiff have any more money and he promised that he would not; that with full knowledge of the purposes for which the money was used the defendant continued to advance the plaintiff money whenever asked with the evident purpose and design of retaining his friendship until he came of age and qualified to make a contract for an extension of the lease so much desired; that about ten days before his twenty-first birthday the plaintiff left his home and commenced a protracted spree on money furnished by the defendant and advanced by him during the continuance of this debauch, returning to his home on the day following his 21st birthday; that the defendant called on him that day (Saturday) and asked for the lease and it was agreed that he would call at the office of lawyers suggested by the defendant on the following Monday and execute it, which was done; that the lease was for the plaintiff's undivided one-half of the premises for a term of 25 years, commencing at the expiration of the present lease in 1906, for a rental of \$1,200.00 per annum, the defendant paying taxes on the improvements only; that the plaintiff did not take independent advice with the guardian or any other disinterested person nor did the defendant ask him to do so; that the plaintiff at the time the lease was executed did not know the value of the property and seemed to rely wholly upon the defendant and believed that he would do the right thing by him; that the property (the whole land) is assessed for taxes

at \$50,000.00 and the annual tax thereon is \$500.00 and that the reasonable net rental value of the land is \$3,000.00; that the plaintiff is an Hawaiian *21 years old* with fair education and slight business training, obtained in nine or ten months clerkship in a store, and with meager knowledge of the value of property or money; that the defendant is a Chinaman, 42 years old and a capable business man, having had fifteen years' business experience at Honolulu.

It is contended on behalf of the defendant that a part of the land was low and marshy and had been condemned as insanitary and ordered to be filled in by the Board of Health; that in order to comply with the order of the health authorities and make all of the property inhabitable it was necessary to expend large sums of money in filling in and raising the grade of the premises; that for the brief unexpired term of the lease held by the defendant he could not afford to make this great outlay; that he was compelled to either surrender the lease for the remainder of the term or secure an extension for an additional term; that this motive prompted him to secure an extension of the term at the earliest possible time it was possible for him to do so.

These considerations offer a plausible and reasonably justifiable motive for wishing and securing an extension of the lease at the time, but would not warrant the defendant in taking an unfair advantage of the plaintiff or in driving an unconscionable bargain with him.

It is clear from the evidence that the rent reserved is not a fair rental value of the present estimated value of the plaintiff's interest therein. It is less than 4% net of the valuation placed thereon for taxes. What the value of the land will be at the commencement of the term, 1906, is somewhat uncertain, but all of the witnesses who testified agree that it would then be greater than it is at present. It has been urged and it seems possible that the taxes on the land which the plaintiff is required to pay will before the expiration of the term of 25 years be greater than the rent reserved. Inadequacy of consideration alone will

not authorize a court of equity to interfere with the agreement of the parties, but taken with other circumstances it is a potent factor. The relation existing between the parties and the trust and confidence reposed in the defendant by the plaintiff seem to bring this case within the well established jurisdiction of a Court of Equity.

The rule is well stated in the case of *Tate v. Williamson*, at pages 60 and 61, 11 L. R. Ch. Appeal Cases, as follows:

"The jurisdiction exercised by Courts of Equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limit of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

The same principle is announced by the Supreme Court of the United States: "When a person, from infirmity and mental weakness, is likely to be easily influenced by others, transactions entered into by such persons without independent advice will be set aside, if there is any unfairness in them." *Allore v. Jewell*, 94 U. S. 506.

The conclusion is inevitable that the defendant did abuse the confidence placed in him by the plaintiff and took advantage of the influence he exerted over the plaintiff to obtain a bargain greatly to his interest and much against the interest of the plaintiff and that this contract so obtained ought in equity and good conscience to be cancelled and annulled.

The decree appealed from is affirmed.

Kinney, Ballou & McClanahan, for the plaintiff.

A. S. Hartwell and Atkinson & Judd for the defendant.

JOHN II ESTATE, Limited, v. R. KAHINU MELE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 16, 1902.

DECIDED JULY 2, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under former Circuit Court Rule 15C, if that rule is still in force, providing that a bill of exceptions may be filed with the Clerk in the absence of the Judge, absence of the Judge from his chambers during a part of a day only, as during the noon hour, is not sufficient.

OPINION OF THE COURT BY FREAR, C.J.

Defendant moves that plaintiff's bill of exceptions be stricken from the record on the ground that it was not presented to the trial judge or allowed or signed by him within the time prescribed by law and the rules of the court.

It seems to be conceded on both sides that the bill was not filed or presented within the time prescribed by law or the rules of court. Plaintiff's sole contention is that the time was extended by stipulation and that the bill was filed and presented within the time stipulated. The stipulation was to the effect that the plaintiff might have five days after the transcription of the testimony in which to file the bill. We will assume that the time might be extended by stipulation without the approval of the court and that the stipulation in question was intended to extend the time for presenting although it in terms purported to extend the time for filing only. The bill was filed April 22, 1902,

within the time stipulated, but was not presented to the judge or called to his attention until June 9, 1902, long after the expiration of the time stipulated.

Plaintiff contends that the filing alone was sufficient under the old Circuit Court Rule 15C, which provides, among other things, that, "Bills of exceptions are to be presented to the Judge who presided at the trial within the time prescribed by law, and in case of his absence they may be filed with the Clerk whose duty it shall be to present the same to the Judge at the earliest opportunity; and he shall endorse thereon the day and hour of filing." The judge states in his endorsement of allowance on the bill that he was not absent from Honolulu but was in attendance at his chambers on April 22, 1902.

The plaintiff contends that "absence" here includes mere temporary absence from the court house, as at the lunch hour, as well as absence from the city. If that were so, the rule, which follows the statute in so far as it requires the bill to be "presented," except in case of the judge's absence, would practically permit the bill to be merely filed in any case, as, for instance, if the judge happened to be in the library or clerk's office, or in any other part of the court house than that in which he was sought. The rule was evidently intended to provide for cases in which the bill could not be presented to the judge on account of his inaccessibility, as when absent from the city or possibly confined at home by protracted illness.

The motion is granted and the bill of exceptions is ordered stricken from the record.

Magoon & Peters for plaintiff.

Robertson & Wilder for defendant.

THE McBRYDE ESTATE, Limited, v. JANE R. GAY,
McH. ROBINSON, A. ROBINSON and F. GAY, part-
ners as GAY & ROBINSON.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED JUNE 19, 1902.

DECIDED JULY 2, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An application for a continuance of a cause is addressed to the sound legal discretion of the court.

Every motion for a continuance should stand on its own merit.

A circuit judge has no right to make a rule or to follow the practice of allowing a continuance of causes for the term, on payment of costs, without sufficient showing therefor.

OPINION OF THE COURT BY GALBRAITH, J.

This cause was at issue for the March, 1902, term of the Fifth Circuit Court. The defendant, not wishing to go to trial, presented a motion for a continuance for the term, supported by affidavits. The motion was opposed by the plaintiff and counter affidavits were filed. The court after remarking several times during the delivery of his decision, in substance, that the rule, in his court was pretty well settled, of allowing almost as a matter of course one continuance on payment of costs, finally concluded as follows: "On the whole, I am inclined to allow a continuance on the usual grounds, with the usual condition, that the defendants pay the costs that arise in connection with it, as being part of the practice of the court, and the question of the amendment

of the answer may be raised later." Whereupon counsel asked that, if an amendment was sought, it should be confined to new matter. The court then referred to the special circumstances of the case and added to the said order that 20 days' notice be given of any motion to amend the answer. The entire order was excepted to by the plaintiff on the ground that it was an abuse of discretion. The bill of exceptions was presented and allowed by the judge.

An application for a continuance under the practice in this Territory is addressed to the discretion of the court, Sec. 1274, C. L. It has been held by this court that where a ruling on an application for a continuance is complained of the court will only look into the matter so far as to ascertain whether there was an abuse of discretion. *Queen v. Ah Kiao*, 8 Haw. 466-8. It is apparent that this discretion ought to be cautiously exercised by the court particularly where so long a time intervenes between the terms as in the Fifth Circuit, and a strong showing ought to be made to warrant the court in continuing a cause for six months especially before the issues are settled.

"A motion to its discretion," said Chief Justice Marshall, "is a motion not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Trial of Aaron Burr*, vol. 1, p. 182.

Every application for a continuance should stand on its own merit. The circuit court under the law has no right to make a rule or to establish a practice allowing a continuance as a matter of course.

Whether the court intended to base the order for a continuance at all on the showing made is perhaps not altogether clear but it is quite evident that he intended to grant a continuance in any event upon what he called the practice of his court. It was manifest error for the court to grant the continuance on that ground but it is impossible to correct the error at this time. The term having lapsed the case will go over as a matter of necessity.

It would be fruitless to sustain the exception, and for that reason it should be overruled. It is so ordered.

Kinney, Ballou & McClanahan for plaintiff.

Robertson & Wilder for defendants.

CONCURRING OPINION OF PERRY, J.

It is not clear from the decision rendered by the judge below that he based his ruling, granting a continuance, solely on the ground that, as a matter of practice in that Circuit, the defendant was entitled to the continuance. It would seem that the court thought that on the merits the motion might properly be granted. The judge said, *inter alia*, that certain facts related by him showed that "there is considerable obscurity with regard to the location of Kuiloa, and, that being so, there has not been any great amount of time granted since suit was commenced for ascertaining where Kuiloa is, and what it is." One of the reasons urged by the defendants in support of their application for a continuance was that they had not had sufficient time to complete a survey of the land in dispute. If the motion was granted because of this supposed lack of time for preparation for trial, I think that it cannot, in view of all the evidence then before the trial judge, be said that the latter abused his discretion in ruling as he did, whatever our own conclusion might be if the application were an original one before us. If, on the other hand, the ruling was based solely on the ground of right as a matter of practice, then I concur that such ruling was erroneous. In view of the fact, however, that the March term of the Circuit Court of the Fifth Circuit has now ended, the exceptions must, in either event, be overruled.

H. M. LEVY *v.* W. K. AZBILL.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 13, 1902.

DECIDED JULY 5, 1902.

Where money has been voluntarily paid on a contract, it can not be recovered back without proof that the one to whom it was paid has failed to perform his part of the contract.

OPINION OF THE COURT BY PERRY, J.

This was an action, instituted in the District Court of Honolulu, wherein plaintiff claimed of the defendant the sum of \$250. Two counts were stated in the declaration, one for money loaned and the other for money had and received for the use of the plaintiff. On appeal to the Circuit Court, as well as in the District Court, judgment was rendered for the plaintiff for the amount claimed. Defendant excepts.

In February, 1900, the defendant, being at the time the lessee of certain premises known as the Queen Hotel, was approached by the plaintiff on the subject of the transfer to him in some form of his, the defendant's, interest in the leased premises and for the sale of his furniture and other property used in the hotel business. The parties having reached an agreement as to the amount to be paid by the one to the other for the transfer, the plaintiff, on the morning of February 19, 1900, paid to the defendant the sum of \$250, the written receipt given therefor setting forth that the payment was "on account of the rent and furniture and furnishings of the Queen Hotel, as per agreement

to be drawn up hereafter." For the plaintiff it is now claimed that the defendant's agreement as to the land and buildings was to sublease to him for practically the remainder of the term of the lease, that the defendant failed, through inability to procure the lessor's consent to such sublease as required by the terms of the original lease, to perform his part of the contract, that therefore there has been a failure of consideration and that the money should be returned. On the other hand, the defendant's contention is that what he undertook to do, as to the land and buildings, was (1) to assign the lease or, (2) at the plaintiff's option, to sublease to him provided he, the plaintiff, procured the lessor's consent to such sublease, or (3) to make the plaintiff his manager and continue to hold the lease in his own name; that the lease is by its terms assignable without the lessor's consent; and that he has been at all times and is now ready and willing to perform his part of the contract.

The trial court found that the contract was to sublease and that the defendant was to procure the lessor's consent. The evidence, we think, is not sufficient to support that finding. In addition to the receipt above referred to, the only other evidence which can possibly be pointed to as tending to sustain the finding is a letter dated February 19, 1900, where in Azbill says, *inter alia*, to Levy: "I understand your final offer to be as follows, viz: 1. You will take the hotel and the cottage for the period of the unexpired lease less one week at a monthly rental of one hundred and twenty dollars, to be paid on the twenty-fifth of each and every month, beginning with the 25th inst. * * * 3. You wish me to give up possession and control to you on the 20th inst., (tomorrow) from which time all rates and liabilities involved in the lease are to be carried by you, and you agree to turn over to me before the expiration of the lease the hotel and cottage with the appurtenances thereof in the like good condition excepting natural wear from use and natural decay. * * * So, upon the terms you propose, on the understanding set forth in this letter, I agree to rent to you the Queen Hotel and cottage with the appurtenances thereof for the time above mentioned

and for the consideration herein set forth." The evidence is undisputed that at the time the payment of \$250 was made and the receipt above quoted given, the parties had not come to any definite understanding as to the *method* of the transfer. Azbill had specifically stated that he was willing to transfer in any one of the three ways above mentioned and upon that state of affairs the money was paid. \$1,500 was to be paid by Levy for the "sale" of the lease, furniture and furnishings, and in addition thereto he was to pay Azbill a rental of \$120 per month, the original lease requiring a payment to the lessors of \$90 per month. The use of the word *rent* in the receipt is thus explained. Subsequently on that day, Levy told Azbill that he thought the lessors would consent to a sublease, and in the evening Azbill wrote the letter of which extracts are quoted above. When the defendant attempted to deliver the letter to Levy early the following morning, Levy declined to accept it as stating the terms of the agreement. Azbill's evidence to this effect is undisputed nor is there anything in the whole record tending to throw discredit on Azbill's testimony. Levy does not testify that he accepted the letter or that it correctly stated the agreement. The meeting last referred to was followed by attempts on Levy's part to obtain the lessor's consent to an assignment or sublease. The lessor after some indefinite answers finally refused to consent, and Levy, fearing legal complications, declined to accept either a sublease or an assignment of the original lease.

Whatever the precise terms of the agreement were, if indeed the parties did subsequently come to any more definite understanding as to the form of transfer, we think it clear that there is not sufficient evidence to justify the finding that Azbill agreed to sublease and to procure the lessor's consent thereto, or that he failed to carry out any agreement made by him. The case presented is one of a payment voluntarily made by the plaintiff to the defendant on a contract. The burden is on the plaintiff to show that subsequent circumstances were such as to require the defendant to return the money to him, as, for instance, that

defendant failed to perform his part of the contract. This burden has not been successfully borne by the plaintiff.

The exceptions are sustained and a new trial ordered.

G. A. Davis for plaintiff.

Magoon & Peters and *J. Lightfoot* for defendant.

IN RE THE GUARDIANSHIP OF KALUA KAPUKINI,
a Spendthrift.

MOTION FOR RE-HEARING.

SUBMITTED JUNE 10, 1902.

DECIDED JULY 9, 1902

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Where no error is pointed out in the former decision and no sufficient reason given for reopening the cause the motion for re-argument and request for modification of the decision will be denied.

OPINION OF THE COURT BY GALBRAITH, J.

Counsel filed motion and petition for re-argument and review of the decision filed in this cause on May 7th, 1902, (*ante* p. 204). When called for hearing he stated that he had that day received instruction from his client, Kalua Kapukini, to the effect that she did not desire a re-hearing but wished to continue under guardianship; after expressing surprise both at this instruction and the manner of its coming to him he said that he wished to withdraw from the cause but in so doing would request the court to modify the decision in certain respects and to order certain advances made by him on behalf of the ward paid out of her estate.

This court in this proceeding, on the mere suggestion of counsel, can scarcely be expected to look into and pass upon the conduct of counsel out of the presence of the court. There are recognized methods of bringing such matters before the court but this is not one of them.

The order referred to allowing counsel fees of \$500 for alleged services rendered in a former proceeding was not appealed from as it might have been by either the guardian or the ward or her counsel and was not before the court at the former hearing nor would it be before us for review if a re-argument were granted.

The affidavits whereby counsel wishes to show that he had voluntarily reduced his fee from \$2,500 to \$1,500 were before the court—having been admitted and filed the same day the trust deed was, i. e., March 7th, 1902. It did not occur to the court then nor does it appear now how the fact set out in the affidavits would affect the conclusion announced in the former decision except to strengthen it.

The trust deed so far as it was considered was held to support the conclusion that the finding of the trial judge that Kalua was competent to transact her own business was erroneous and that it tended to prove that she was improvident and was likely to part with her property without full consideration. The fact that counsel voluntarily relinquished, (or intended to do so) one-half or two-fifths of the amount of the fee she agreed to pay him for his services most certainly confirms the correctness of our conclusion.

Application should be made to the Circuit Judge for allowance of any advances or other proper payments made by counsel for Kalua. This court passes upon such matters on appeal and not in the first instance.

Counsel having failed to point out any error in the former decision or to show satisfactory cause for modifying the same the motion and request are denied.

Thomas Fitch for motion.

J. Alfred Magoon contra.

SISTER ALBERTINA, Trustee for STELLA K. COCKETT,
vs. THE KAPIOLANI ESTATE, Limited, DAVID
 KAWANANAKOA, JONAH KALANIANAOLE, W.
 KAAUWAI and KEANAPUNI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 21, 1902.

DECIDED JULY 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When one is shown to have been, for more than the statutory period, in actual, open, notorious, continuous and exclusive possession of land, apparently as owner, and such possession is unexplained as by showing that it was under a lease from or other contract with or otherwise by permission of the true owners, the presumption is that such possession was hostile.

OPINION OF THE COURT BY PERRY, J.

This is an action of ejectment for a piece of land situate at Honuakaha, Honolulu, and containing an area of 1.6 acres. The property consisted formerly of a fishpond and its banks and, perhaps, a small piece, additional, of dry land, and was a *lele* of the Ili of Kaalaa, situate at Pauoa, Honolulu. Mahele Award No. 61 was signed by Kamehameha III on January 28, 1848, the King thereby consenting to the award by the Land Commission to one Namakeha of the Ili of Kaalaa. The Mahele Award reads as follows:

“Ko B. Namakeha.

Na	Aina.	Ahupuaa.	Kalana.	Mokupuni.
	Kaalaa.	Ili no Honolulu.	Kona.	Oahu.
	Waikele.	Ili no Waikele.	Ewa.	Oahu.

Ke ae aku nei au i keia mahele, ua maikai. No
Beneki Namakeha na aina i kakauia maluna: ua ae ia
'ku e hiki ke lawe aku imua o ka Poe Hoona Kuleana.
(Sgd) Kamehameha.

Hale Alii, January 28, 1848."

On December 7, 1854, L. C. A. No. 7260 was issued to Namakeha, this award covering, however, only that portion of the Ili known as Kaalaaluna and describing the latter by metes and bounds. R. P. 4371, dated May 14, 1858, to Namakeha, was likewise for Kaalaaluna only,—again describing the land by metes and bounds. Namakeha was evidently entitled to receive an award or patent for the remainder of the Ili, to wit, for Kaalaalalo and the *lele*, but, for reasons not appearing in this case, no such award or patent was issued during his lifetime. He died in December, 1860. On June 24, 1862, the Minister of the Interior under the authority of the Act of 1860, made an Award (Vol. 3 of Awards, p. 337) which reads as follows:

"Helu 61. Namakeha.

Ili no Kaaha, ma Honolulu, Oahu. Helu 61 B. Ili Waikele, ma Waikele, Ewa, Oahu.

Koe nae ke kuleana o na kanaka.

Costs \$2 each, \$4.00.

24, June, 1862.

(Sgd) L. Kamehameha.

Pd 25 June for 1 Aw'd (60)"

Assuming that "Kaaha" was intended for "Kaalaa," this award or grant would seem to be broad enough in its terms to cover the whole ili or, since Kaalaaluna had been already covered by the Land Commission Award and Royal Patent above referred to, at least Kaalaalalo and the *lele*. However that may be, Kaalaalalo is not claimed in this action under this award or otherwise.

By whom this award or grant was applied for, does not appear in evidence. R. P. 7429, referring therein to Mahele Award No. 61, was issued March 10, 1880, in the name of Namakeha,

with *habendum* to him, his heirs and assigns forever, and describing by metes and bounds the *lele* only. This Patent recites that application therefor was made to the Minister of the Interior by Her Majesty Queen Kapiolani.

The plaintiff claims under a deed of trust from Stella K. Cockett. The latter, it appears from the evidence, is the daughter and sole heir of one Hinau, who was the son and sole heir of Namakeha. She claims by inheritance from Namakeha, if the latter died intestate as to the land in controversy, but claims also that the *lele* was devised by Namakeha by his last will to Kapiolani, his widow, for life and after her death to the Prince of Hawaii, and that from the latter an undivided three-fourths interest passed by descent to her, the plaintiff. It may be assumed for the purposes of this case that Stella Cockett was entitled by inheritance to three fourths of the interest, if any, of the Prince of Hawaii. She seems to claim, further, under the award or grant of 1862 as the heir of Namakeha.

At the time of Namakeha's death, the title to the *lele*, so far as appears from the evidence, was in the Government; Namakeha at that time had no title to it. The presumption, if any, would be that under those circumstances he would not attempt to devise it by will. Nor can this will be construed as attempting to dispose of that property. The clauses in question read as follows, the first being in the original will and the second in a codicil:

"I give to my beloved wife Kapiolani the half of my house lot No. 4381 adjoining King and Alakea Streets in Honolulu and my land at Kaalaaluna is to be divided between her and Emma the wife of the King the division to be as follows, the mauka part of said land (No. 4371) mauka of the road going to Pauoa is for Emma and the two *lois* of Nakamakaweuweu on the makai side of the said road and the balance of said land and the place of Ulu and the houses and all other property there are for Kapiolani, provided she relinquishes her right of dower which the law gives to the widow."

"I hereby give to Kapiolani the two taro patches of Nakamakaweuweu and the place of Ulu and the remainder of said land and the houses and all the property there that is to say my

own house lot are for Kapiolani and the Prince of Hawaii in the following manner however during the life time of Kapiolani she is to have the income from the house lot to be hers only and at the end of Kapiolani's life it shall descend to the Prince of Hawaii."

Undisputed evidence shows that "the two taro patches of Nakamakaweuweu," "the place of Ulu" and "my own house lot," are all situate in Kaalaaluna. It is clear, we think, from the language used, that the testator by these provisions intended to and did dispose of land at Kaalaaluna only and not of Kaalaalalo or the *lele*. The *lele* would not, under the circumstances, pass as a part of Kaalaaluna.

It may be assumed for the purposes of this case that the plaintiff established a *prima facie* case by showing that Stella Cockett is the heir of Namakeha and that the award or grant above referred to was issued in 1862 in the name of Namakeha.

The defense to the action was that of adverse possession. At the close of the defendants' case, the presiding judge, upon motion, directed the jury to render a verdict for the defendants, such direction being upon the ground that the evidence offered for the defense made out a case of adverse possession and that there was no evidence before the court tending to rebut that showing. To that instruction the plaintiff excepted, and this is the exception mainly relied upon in this Court.

Undisputed evidence was introduced by the defendants showing that from 1852 or, perhaps, 1850, (Kapiolani and Namakeha married in 1850) Kapiolani at various times had the pond cleaned out, that her servants by her direction fished therein and delivered the fish to her for her use, that she sometimes gave them some of the fish, that she erected a small building on the bank of the pond or on the kula adjoining, that a man employed and directed by her to care for and take charge of the pond occasionally lived in that building, and that she at times objected to horses being pastured on the kula of the pond because the animals might enter the pond and cause injury to it. In 1875 Kalakaua, her husband, had the land surveyed.

In 1880 she procured the issuance to her, though in the name of Namakeha, of the Royal Patent above mentioned. On December 31, 1898, she divided the land into at least twelve lots and executed deeds or perpetual leases of said lots one each to certain of her retainers. Neither Namakeha, nor Hinau, who was of age at Namakeha's death, nor Stella Cockett, who became of age in 1886, ever exercised, so far as the evidence shows, any acts of ownership over the land. Of the witnesses who testified and who saw and knew of Kapiolani's acts, none saw or knew of any such acts by any of the three persons just named. This action was commenced in December, 1899.

Without reviewing the evidence in further detail, we think that it clearly appears therefrom that for much more than twenty years prior to the institution of these proceedings Kapiolani had possession of the land in dispute and that such possession was actual, open, notorious, continuous and exclusive. We think it also clear that the evidence is ample to support a finding that for more than the statutory period such possession was hostile. Further, had the case been left to the jury and had a verdict been rendered for the plaintiff such verdict could not have been held supported by the evidence. It would be by mere conjecture only that the jury could have arrived at the conclusion that the possession was not hostile but permissive. While it is true that the burden is on the party affirming the existence of adverse possession to show that his possession was in fact adverse, it is also true that where one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under a lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile. See 1 Am. & Eng. Encycl. Law, 2nd ed., 888, 890; 1 Cycl. L. & P. 1146; *Morse v. Churchill*, 41 Vt. 649, 651; *Neel v. McElhenny*, 69 Pa. St. 305; *Wilkins v. Nicolai*, 99 Wis. 178, 182, 183; *Meyer v. Hope*, 101 Wis. 123, 125. No explanation whatever, was offered in evidence as to the

nature of Kapiolani's possession; nor was Kapiolani shown to have been a co-tenant of or to have occupied a fiduciary relation towards any of the alleged true owners.

The application by Kapiolani, in 1880, for a Royal Patent covering the *lele*, was not a recognition by her of the title of the heirs or assigns of Namakeha. As the law stood, the Patent could not have been issued in the name of any one other than the original claimant or awardee.

The exception to the direction of the verdict is overruled; so also are the other exceptions.

Peterson & Matthewman for plaintiff.

Kinney, Ballou & McClanahan for defendants.

ADELAIDE SCHLIEF and JOHN SCHLIEF, her husband
vs. JOSEPH CLARK, ALEXANDER LAZARUS,
HENRY SMITH, as guardian of Naomi Lazarus, a minor,
and JOSEPH O. CARTER, as guardian of Madeline H.
K. Lazarus and Eleazar K. Lazarus, a minor.

APPEAL FROM JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 19, 1902.

DECIDED JULY 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a partition suit, rents accruing on property sold between the date of sale and confirmation, and collected by a receiver or trustee and paid into Court, the Master's report being confirmed and deeds being delivered to the purchasers without collecting interest on the balance of the purchase money held by them pending the confirmation, belong to the heirs or partitioners and not to the purchasers.

This is an appeal from an order made in the above cause on April 18th, 1902, directing the Master to pay to certain of the purchasers at a Master's sale the rents accruing amounting to \$594 and collected from certain property sold between the date of sale and the final confirmation and delivery of deeds in pursuance thereof, a period of five months.

The only question presented by the appeal is whether these rents belonged to the purchasers or the heirs.

The sale was ordered in a partition proceeding and a commissioner appointed to make the sale and the order after fixing the time and place of sale proceeded as follows: "That said sale be made for cash, and be subject to confirmation by the court. That 10% of the amount be paid on the day of sale and the balance to be paid upon the confirmation of said sale by this court and the delivery to him or them of the deed or deeds for said real estate by said commissioner."

The sale was made by the commissioner on September 14th and reported to the court on October 1st, 1901. The order of confirmation was made December 2nd, 1901. An appeal was taken from a portion of the decree i. e., that making allowances of certain costs and commissions and this appeal was decided by this Court on February 28th, 1902 (*ante*, 78) and on the same day the circuit judge made a final decree in compliance with the decision of this Court confirming the commissioner's report and ordering the execution of deeds to the several purchasers on the payment of the balance of the purchase money and for the distribution of the proceeds and ordering the discharge of the commissioner on his filing receipts and vouchers. These last were filed on March 18th, 1902. On December 16th, 1901, a receiver or trustee by consent of all parties was appointed and ordered to collect and pay into Court the rents accruing pending the confirmation of sale.

On April 16th three of the purchasers joined in a motion to the court asking that the receiver or trustee be directed to pay to them the rents collected from the property purchased by

each of them respectively. This motion was granted and the order appealed from made on April 18th, 1902.

It is contended on behalf of the appellees that the purchasers had the use of the purchase money, except the 10% deposited on the day of sale, amounting to \$18,000.00 pending the confirmation, the very time during which the rents accrued; that the purchasers should have paid interest on the deferred payments in order to be entitled to demand the rents; that they did not pay interest and were not entitled to the rents.

Under the general rule of law and particularly under the order of sale in this case the contract of sale was not complete until confirmed by the court. Prior to that time many things might have happened to defeat or avoid the contract. "Until confirmed by the court, the sale confers no rights. Until then it is a sale only in a popular, and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sale. 'The accepted bidder,' (say the Supreme Court of Kentucky), 'acquires, by the mere acceptance of his bid, no independent right, as in case of a purchaser under execution, to have his purchase completed;' but is merely a preferred proposer, until confirmation of the sale by the court, as agreed to by 'its ministerial agent.'" Rorer on Judicial Sales, Sec. 106.

"In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; in such cases the purchaser is not entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed." 2 Daniell's Ch. P. & P. (Sixth Am. Ed.) 1274.

"As title does not vest in the purchaser until after the confirmation of the sale, he has, prior to that time, no right to the possession of the property sold, and no legal cause of complaint against the defendants, who remain in possession, exercising the rights of ownership, including the right to cut and remove all crops growing upon the premises, and which are in a condition to be cut and removed in the usual course of good farming." 2 Freeman on Executions (3rd ed.), section 304a.

"Confirmation is said to be the judicial sanction of the court.

Until then the bargain is incomplete." *Smith et al. v. Steamship City of Columbia*, 11 Haw. 710.

Mr. Justice Story when on the circuit decided that the purchasers at a Master's sale had no claim to the rents and profits derived from the property sold except from the time when the conveyance to them was complete. *Wood v. Mann*, Fed. Cas. Vol. 30, No. 17954. *Cheney v. Woodruff*, 45 N. Y. 98, is a strong authority to the same effect.

The Supreme Court of Ohio in expressing a contrary view say that the purchaser is "required to pay interest from the day of sale on so much of the purchase price as he has not actually paid." *Jashenosky v. Valrath*, 59 Oh. St. 540-546.

The judge below seems to have been confused by the doctrine of relation and to have proceeded on the theory that as the title related back to the day of sale this also carried with it the right to the possession and rents and profits accruing from that time. It does not follow from the fact that by the order of confirmation the purchaser was vested with all of the title of the partitioners on the date of sale that they are entitled to the possession and rents from that date.

"This doctrine of relation," (says the Supreme Court of Nebraska) "has reference only to the title which the execution debtor had to the real estate at the time the judgment became a lien, but it has no necessary reference to the *quantum*, whether more or less, of estate, which the execution debtor owned at the time the judgment became a lien." *Yeazel v. Einspahr*, 24 L. R. A. 449, 451.

We conclude that the judge having confirmed the Master's report and ordered deeds delivered without requiring the payment of interest on the balance of the purchase money erred in allowing the rents to the purchasers; that these, under the facts of this case, belong to and should have been distributed among the heirs or partitioners.

The appeal is sustained, the order appealed from is reversed and the case is remanded for such further proceedings, consistent with this opinion, as may be necessary. ,

Russell & Watson for appellants.

Holmes & Stanley for appellees.

KAPIOLANI ESTATE, Limited v. A. S. CLEGHORN.**EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.**

SUBMITTED JANUARY 14, 1902.

DECIDED JULY 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is not error to refuse to instruct the jury that a certain article of a certain constitution was in force during a certain period, without stating the substance of the article, even if the article were applicable to the case.

Time does not run against the state even though the state does not acquire title until after the period of limitation has begun to run against the prior owner.

The rule that time does not run against the king applied to the King of Hawaii in his capacity as sovereign only, and not in his private capacity.

Article 39 of the Constitution of 1864, which provided that, "The King's private lands and other property are inviolable," though applying to his strictly private lands as distinguished from crown lands, did not prevent the statute of limitations from operating upon such private lands.

Evidence held sufficient to justify the giving of instructions as to the law of tacking successive adverse possessions.

Where one is shown to have been in possession for the period of limitation apparently as owner, and the possession is not explained or otherwise accounted for, it will be presumed to have been adverse, although the presumption is open to rebuttal.

Instructions need not be given in the form requested if given substantially in other form.

Evidence held sufficient to support the verdict.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

The case is sufficiently stated in Mr. Justice Perry's dissenting opinion. It is a case of ejectment and comes here on ninety-two exceptions, only a few of which are now relied on. The only question is whether the defendant made out a case of adverse possession. The trial was lengthy and the contest was chiefly upon the question of fact as to whether the defendant's possession had been adverse for the statutory period, and most of the instructions asked or given related to the general law of adverse possession. But at the close of the case, perhaps as an afterthought or as a result of a new discovery, the plaintiff raised the question whether the holding could be adverse as matter of law, however adverse it may have been in fact, for the reason that during a portion of the period in question the King had the paper title and during a smaller portion of that time the Constitution of 1864 was in force, which provided, in Article 39, that, "The King's private lands and other property are inviolable." This is made the chief point in this court and will be considered first.

The exception by which this question is brought here is that to the refusal to give the following instruction: "The jury are instructed that Article 39 of the Constitution of 1864 was the law of the land until the promulgation of the Constitution of 1887." This instruction was properly refused, if for no other reason, because it was meaningless so far as the jury was concerned. Of course that article was the law of the land until it was abrogated. There was no dispute about that, and the verdict could not properly have been influenced one way or the other by that mere statement. The court was not even requested to state the substance of that article, much less to construe it. It might as well have instructed the jury that any other article of that constitution or the whole constitution was in force until abrogated. There is nothing whatever to indicate that the jury even overheard the article read when the matter was argued to the court. We are informed that it was argued, though ap-

parently very briefly, but there is some reason to believe that the jury was not then present. The plaintiff could hardly expect the instruction to be given on the idea that the jury should find a copy of that constitution and construe it for themselves.

There are, however, certain other exceptions under which it might at least be argued that the same question could be raised, although the giving and refusing of instructions, to which such exceptions were taken, was apparently based on the theory that such instructions were intended, as probably they were, to relate only to the general law of adverse possession. The question will therefore be briefly considered on its merits.

The question is whether this constitutional provision prevented the running of the statute of limitations against the King as to his private lands, that is, whether one could acquire title by adverse possession as against the King in his private or natural capacity.

The question is one of great difficulty. Probably the article was intended to relate to crown lands as distinguished from government lands, for it was copied from the constitution of 1852 (Art. 41), and at that time the crown lands were regarded as private lands for many purposes and were often spoken of as such. See *Estate of Kamehameha IV*, 2 Haw. 715. But, whether it was intended to relate to such lands or not, it seems clear that it was intended to relate to lands, such as those in question, owned by the King in his private capacity. The question would then remain whether the word "inviolable" should be construed as exempting the King's private lands from the statute of limitations.

If the statute could not run against the King in case he had the title when the adverse possession began, the fact that he did not acquire the title in this instance until after the adverse possession began would not prevent the statute being stayed as soon as he did acquire title. The same rule would apply in such case as applies when a state acquires title after the statute has begun to run. As soon as the state acquires title the running is stayed. *United States v. Nashville, &c. R'y. Co.*, 118 U. S. 120, 126.

The general rule that disabilities arising after the statute once begins to run do not interrupt it, does not apply in this instance, for no subsequent disability arose when the King acquired title, for he could sue though he could not be sued.

Nor should the approval of the statute of limitations by the King be construed as a waiver of his constitutional exemption, if the exemption would otherwise apply. *Wellion v. Berkley*, Plowd. 239, 240, quoted in note to *People v. Herkimer*, (4 Cow. 345), 15 Am. Dec. 379.

The common law differed in many respects in its application as between the King and his subjects. The King, however, was recognized as having a natural and a political capacity. He could hold land in each capacity. Lands held in his private or natural capacity descended to his heirs. Those held in his political capacity descended to his successors. 8 Bac. Abr. Tit. Prerogative, E. 2; Co. Litt. 15b. and note (4). This distinction existed here as between the King's private lands strictly speaking and his crown lands. It is said that anciently, at common law, prescription ran against the King as against other people as to his private lands, but not as to lands appurtenant to the crown, but that for several centuries this distinction has not been observed and that the crown is excepted by implication from the operation of statutes of limitation unless expressly named. *United States v. Hoar*, 2 Mason 311, 313. Statutes of limitation have been passed in England and many of the United States which by their express terms run against the King or the State.

Whatever may be the rule at common law, it seems to be conceded by the plaintiff that the common law maxim *nullum tempus occurrit regi* did not apply here as to the King's private lands. That is supposed to have been a prerogative of the King as sovereign and not in his private capacity, and is possessed by even republican governments as an attribute of sovereignty. It was expressly held in *Harris v. Carter*, 6 Haw. 195, 209, that time would run against the King as to crown lands even. Much more would that be the case as to his strictly private lands. The

plaintiff's contention is, not that the general rule applicable to sovereignties applies here, but that the special constitutional provision in question applies to the King's private lands. But what force was the word "inviolable" intended to have? Was this provision intended, for instance, merely to cover substantially the same ground as that covered by the provision in the constitution of 1840 that, "He also shall retain his own private lands"? A number of provisions of the constitutions of 1852 and 1864 were but restatements, in more exact or more modern form, of provisions in the crude constitution of 1840. Was this provision intended to mean that the King's private lands should continue to be regarded as such and not be regarded as held by the King in his political capacity, or as subject to legislative action, as were the government lands? The provision is very indefinite. There are other provisions protecting the property and other rights of subjects. Was the provision relating to the King intended to go farther than the provisions, worded just as strongly, relating to the people generally? Perhaps so. Perhaps not. If not, its presence could be accounted for on the ground that the King occupied a dual position, as others did not, and consequently that there was danger that in regard to his rights there might be confusion in the absence of such a provision. If the intention was to give him greater rights, what greater rights? We need not undertake to say. There is much reason to suppose that the intention was not to exempt the King's private lands from the operation of the statute of limitations and, the question being at least one of doubt, the leaning should be towards the more enlightened view.

In support of this we may refer to former decisions of our own courts in so far as they bear on the question, and reason by analogy from decisions of other courts on other constitutional provisions.

For instance, in *Estate of Kamehameha IV, supra*, it was held that even the crown lands, limited though they were to the King and his successors, were subject to dower. If they be-

longed to the successor King on the demise of the predecessor King, and if, because they were "inviolable", they were not subject to general limitation laws, would they be any more subject to the general dower law? If they were, the Queen Dowager of the former King would take an estate for life in one-third of the reigning King's lands under the general law without the latter's consent.

Again, in *Harris v. Carter, supra*, the court actually decided the very question now before us. It is contended that the opinion there expressed on this point was only a *dictum*, but it appears to have been an actual decision. The question was whether the plaintiffs had title to certain lands which the Commissioners of Crown Lands claimed as crown lands. The plaintiff claimed (1) by devise from Kamehameha III to his Queen, Kalama, by descent from the Queen to Charles Kanaina, and by deed from Kanaina to himself, and (2) by adverse possession begun by Queen Kalama after the death of Kamehameha III. The court held that the title to the lands in question did not pass by the devise, descent and deed, and consequently it became necessary to decide upon the validity of the second contention, that of adverse possession. It was decided that adverse possession could be held against the Kings Kamehameha IV and V. Up to that point in the case evidence as to adverse possession had been fully put in as to only one of the lands in question, as to which the evidence was held not sufficient. The court left the parties at liberty to introduce evidence as to adverse possession in regard to the other lands involved. The parties thereupon, as the papers on file show, consented to judgment for the plaintiff as to certain of those lands and for the defendants as to the rest. It is true that the decision was by a single judge only, but it was by one peculiarly fitted for deciding the question by reason of his familiarity with the political and constitutional history of the islands and the views of the chiefs and people. The judgment was not questioned or appealed from although the defendants, besides being familiar with the ancient conditions and laws themselves and representing in

a sense the King himself, were represented by counsel of ability and learning, a former member of the Supreme Court. It may be, also, that the attention of the court was directed only to the general maxim that time does not run against the King and that the constitutional provision was overlooked. But, considering who were concerned or took part in that case—the Justice, the counsel, the Commissioners of Crown Lands and the King himself—and the importance of the question, it would seem that either the constitutional provision was thought not to apply if it was noticed, or else that in the opinion of those who, if any, ought to know, there was nothing in Hawaiian ideas or customs or history or the status of the King beyond what appertained to kings generally that would exempt his private lands from the operation of the statute. That being an actual and carefully considered decision by the best authority, and the point being at least a doubtful one, it would seem that we ought not to take a backward step by overruling it.

- . Decisions in somewhat analogous cases elsewhere tend to support the holding that the King's lands are not violated by the application of the statute of limitations to them. The Federal constitution provides that, "No State shall * * * pass any * * * law impairing the obligation of contracts." And yet there is no question of the constitutionality of a statute which, though enacted after a contract has been made, limits or reduces the time within which action may be brought on it, provided a reasonable time is allowed—even though the effect of a failure to bring action within the time limited is to take away all remedy and destroy the value of the contract. *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Cranor v. School District*, 151 Mo. 119. The Constitution of California provided that each stockholder of a corporation should be personally liable for his proportion of all debts contracted while he was a stockholder, and contained no limitation as to the time within which action might be brought. But it was held that the statute of limitation "does not attempt to relieve the stockholder from his liability under the constitu-

tion; it only limits the time within which the action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder." *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407. Indeed, the constitution of 1864 itself contained provisions that protected the private property of subjects generally, and all modern constitutions contain similar provisions protecting life, liberty and property. Private property as a rule cannot be taken except for public use and then only upon just compensation and by due process of law. And yet no one questions the constitutionality of reasonable statutes of limitation the effect of which is usually held to be in the case of specific property to actually transfer the title as well as bar the remedy.

Exceptions were taken also to certain instructions given at the request of the defendant, to the effect that, if the jury found certain enumerated facts, the defendant was the heir of his daughter the Princess Kaiulani, and that the possessions of several possessors between whom there is privity of estate, such as ancestor and heir, may be added together. It is not disputed that these instructions set forth correct law. The contention is that they were inapplicable because the evidence showed that the daughter never had possession. In our opinion, there was sufficient evidence to justify the giving of these instructions. There seemed to be some uncertainty in the defendant's testimony at first as to whether he held possession originally in his own right or in that of his wife or daughter, but he finally seemed to take the position that it was in his own right. But there was considerable testimony, drawn out largely by the plaintiff, tending to show a parol gift to the daughter and that the defendant had been regarded as holding in her right until her death. There was no doubt that he was her heir. This justified the instructions as to tacking possessions.

Another exception was to the defendant's requested instruction that, "Where one is shown to have been in possession of land for the period of limitation, apparently as owner, and such pos-

session is not explained or otherwise accounted for, it will be presumed to have been adverse, although this presumption is open to rebuttal." This instruction was taken substantially from 1 Am. & Eng. Enc. of Law (2nd ed.) 889. It was held to be correct law in *Sister Albertina v. Kapiolani Estate, Limited, ante*, 321. Grouped with this exception are exceptions to the refusal to give two instructions requested by the plaintiff to the effect that if the defendant was allowed by the holder of the legal title to take possession and if he took possession with the consent of the owner, as a matter of convenience and without any understanding that the property should belong to the defendant, the possession, however long continued, would not bar a recovery, and that consent need not be expressed in words, but might be shown by acts and attendant circumstances, and that certain enumerated acts might be taken into consideration in determining the question of consent. In so far as these refused instructions were warranted by the evidence, their substance was sufficiently covered by other instructions that were given.

It is contended under other exceptions that there was no evidence to sustain the verdict. The evidence is voluminous and it will serve no useful purpose to review it at length. The main contention on this point is that the possession was shown to be permissive and not adverse. It must be conceded that there is much that can be said in support of this contention. But the argument is one that would more appropriately be addressed to the jury. On the whole, in our opinion, there was sufficient evidence to sustain the verdict, whether the weight of the evidence was on that side or not.

The exceptions are overruled.

Kinney, Ballou & McClanahan for the plaintiff.

Robertson & Wilder for the defendant.

DISSENTING OPINION OF PERRY, J.

This is an action of ejectment, the land in controversy consisting of two pieces situate at Waikiki, Oahu, one being makai of

the main Waikiki road, a beach lot, and the other being several hundred feet mauka of the road. The plaintiffs claimed title by deed and inheritance; the defense was adverse possession for the statutory period. The judge presiding at the trial charged the jury that the plaintiff had established a paper title to all the land sued for, and that instruction was not excepted to. The sole question left to the jury to determine was whether or not the plaintiff's title had been defeated or his right to recover herein barred by adverse possession on the part of the defendant or on the part of his daughter Kaiulani and himself. The jury rendered a verdict for the defendant.

Undisputed evidence showed that the beach lot, exclusive of subsequent accretions, i. e., as it was at the date of the award, and the mauka lot, excepting only a triangular piece on the westerly border containing about 1250 square feet, were granted, with other adjoining land, to M. Kekuanaoa by L. C. A. 104, F. L., Apana 5, and confirmed to him by R. P. 4493. From the patentee the two pieces passed by descent to King Kamehameha V and on the latter's death by descent to Princess Ruth Keelikolani. On November 16, 1876, the mauka piece, including the small triangle above referred to, was, as a part of a much larger tract, conveyed by deed by Keelikolani to King Kalakaua, and on April 16, 1880, the makai piece, also as a part of a larger tract, was conveyed by deed by Keelikolani to the same grantee. Kalakaua died January 20, 1891, and under his will all of his title to the two pieces in controversy passed to his widow, Queen Dowager Kapiolani, from whom by various mesne conveyances the paper title passed to the plaintiff.

One of the exceptions is to the trial court's refusal to instruct the jury, *inter alia*, that "Article 39 of the Constitution of 1864 was the law of the land until the promulgation of the Constitution of 1887", another to the verdict on the ground that it was contrary to the law, the evidence and the weight of the evidence and a third to the court's refusal, *pro forma*, to grant a motion for a new trial. There was also an exception to the denial of

plaintiff's motion "that the jury be instructed to return a verdict for the plaintiff on the ground that there is no evidence here to support the defense of adverse possession", and one to the giving of the following instruction requested by defendant: "The law is that no person shall commence an action to recover possession of any land or make any entry thereon unless within twenty years after the right to bring such action first accrued. You are instructed that the right of the owner of the land in dispute to bring an action first accrued when the defendant, A. S. Cleghorn, commenced to hold possession of the same adversely to the owner, and if you believe that such adverse possession has continued uninterruptedly for at least twenty years from that time before the commencement of this action, your verdict will be for the defendant."

Article 39 of the Constitution of 1864, granted by Kamehameha V on August 20 of that year, is as follows: "The King's private lands and other property are inviolable." On behalf of the plaintiff it is contended that because of this provision the statute limiting the time within which an action may be brought to recover land or an entry be made thereon can have no application against the King as an individual and that title by adverse possession can not be acquired against him as such individual. If this position is correct, the verdict is contrary to the law and the evidence. Upon the view of the evidence most favorable to the defendant, his adverse possession commenced not earlier than December 25, 1875. Service of summons in this action was made October 10, 1899. Kalakaua ascended the throne in 1874, and the Constitution of 1864 continued in force until July 7, 1887. From November 16, 1876, then, until July 7, 1887, the title to the mauka piece, and from April 17, 1880, until July 7, 1887, that to the makai piece, were in the King, though as his private property, during a time when Article 39 of the Constitution of 1864 was in force. If the statute of limitations was not operating or the adverse possession not accruing during those periods, then, subtracting the shorter, seven years, from the maximum

claimed, twenty-four years, it is clear that the defendant's possession for the remainder, seventeen years, was insufficient to divest the title of the King or of those holding under him.

For the defendant the argument advanced in reply to the plaintiff's contention on this subject is two-fold: first, that the term "private lands" is not used in the Constitution in its ordinary acceptation but with reference solely to that part of the public domain reserved by the King for himself in the great mahele and later known as the "Crown Lands" and (2) that by the use of the word "inviolable" it was not intended to exempt the property described in the section from the operation of the statute of limitations or of the rule of adverse possession and that the intention was either to restrain the legislature from legislating as to the crown lands adversely to the King or to restrain the King from disposing of them injuriously to the public.

It is a rule in the interpretation of constitutions and perhaps of some other written instruments that words are to be understood in their natural, ordinary and untechnical meaning unless the nature of the subject indicates or the context suggests that they were used in a technical sense. See Endlich on Interpretation of Statutes, p. 714, Story on Constitutions, § 451, and Cooley on Constitutional Limitations (6) p. 73. The word "private" is one of common usage and of well known signification. It seems almost superfluous to define it. "Belonging to, or concerning, an individual person; personal; one's own; not public; as, a man's *private* opinion; *private* property."—Webster's International Dictionary. I am unable to find within the Constitution itself any reason for believing that the word was not used in this, its ordinary acceptation; on the contrary it is not without indications that it was so used, for instance, it is closely followed, in Article 40, by a provision which undoubtedly refers to the King *as a private individual* and gives him an immunity not possessed by other inhabitants of the realm. "The king cannot be sued or held to account in any court or tribunal of the realm." See *Green v. Cartwright*, 7 Haw. 726. Article 31, "The person

of the King is inviolable and sacred", further discloses a disposition and an intention to extend immunities and privileges to the King *in his private capacity*.

It seems that in the days shortly following the Mahele the Crown lands were sometimes referred to as the King's private lands. It does not appear, however, that the term was thus used so widely as to acquire that special, technical signification. It may be that the words "private lands" are capable of being construed as meaning the lands known as the Crown Lands, but that they were not so used in the section in question is further demonstrated by the very language of that brief section. In the phrase "private lands and other property", the word "private" modifies the words "other property" as well as the word "lands". This shows that the word "lands" is there used not in the limited sense of Crown Lands but as including all lands coming under the class "private", as ordinarily understood. To the extent that the words "other property" are limited or qualified by the word "private", to that same extent is the word "lands" limited or qualified by the word "private."

Of greater difficulty is the ascertainment of the true meaning of the word "inviolable" as used in Section 39. What was the intention in inserting that section?

Some definitions are here given. "Inviolable. Having a right to or guaranty of immunity; that is to be kept free from violence or violation of any kind, as infraction, assault, arrest, invasion, profanation; incapable of being injured."—Cent. Dict. "That can not be violated; incapable of being injured or disturbed; exempt from legal prosecution or punishment."—Standard Dict. "Violate. To treat roughly or injuriously; to do violence to, interrupt or disturb."—Cent. Dict. "Injure. To do harm to; inflict damage or detriment upon; impair or deteriorate in any way."—*Id.* "Impair. To diminish in quantity, value, excellence, strength; to deteriorate."—Anderson's Law Dict.

The King's interest in or title to land was property of his. Was such property violated by the operation of a statute of limitations

or by adverse possession by another? It may be that if our statute simply limited the time within which an action may be brought in a court for the recovery of the land, such a provision would not be such a violation. It has been held by courts that such statutes, purely of limitation of the time of bringing actions in courts, if reasonable, affect the remedy only and do not impair the right, because, it is argued, other remedies exist and the right continues good, only unenforceable in the legal tribunals. Our statute, however, goes further and limits not only the time within which an action may be brought but also the time within which entry may be made. It bars all remedy after the lapse of the period stated. Its effect, though it does not so specifically provide, is to extinguish the title of the real owner and to vest it in the adverse holder. Certainly that is the effect of the doctrine or rule of adverse possession, which is now too well established to require anything further than its statement. Whatever the reasons are for the rule or the theory on which it is based, that is its effect. "The statute of limitations gives a perfect title. * * It is a mistake to suppose that the person barred by the statute loses nothing but his remedy. The law never deliberately takes away all remedy without an intention to destroy the right. Remedies are frequently changed. One is withdrawn and others remain, or one is substituted for another. But when all remedies are taken away after a specified period of neglect in asserting rights, and when this is done for the purpose of promoting the best interests of society, the right itself is destroyed. In this case, the tenant for life, at the time he released to the plaintiff could neither make entry nor maintain any real or possessory action. His right was completely vested in the person in possession. He had nothing whatever to convey."—*Moore v. Luce*, 29 Pa. St. 262. See also 3 Wash. R. P. 164.

If, then, our statute of limitations or the doctrine of adverse possession applied in their full force against the King in his personal capacity, their effect would be not only to impair but to absolutely destroy the right or title involved. Such title would suffer detriment and injury.

It is argued in this connection that the divesting of title caused by the statute or by adverse possession is not a violation of the real owner's right or property, because the title passes by virtue of the presumed acquiescence or consent of the real owner. It is true that it is sometimes said that from a possession adverse for the statutory period the law conclusively presumes a grant or conveyance; but it is also true that in very many cases, perhaps in a majority of cases, this proves to be a mere fiction of law and that no such conveyance or acquiescence has been in fact made or given. The law, recognizing this, nevertheless regards the title as having passed, its policy being (in the absence of constitutional provisions to the contrary) for the peace of the community not to allow "a possession to be questioned after it shall have been enjoyed for such a length of time as renders it unreasonable, in the eye of the law, to require evidence, *aliunde*, that it was holden under a right of ownership derived from some other sufficient and legitimate source." See 3 Wash., R. P. 124. It seems to me that Section 39 cannot be held to be inapplicable on the theory that the divesting of title by adverse possession was the voluntary act of the King.

It may be said that if the application of the statute and of the doctrine of adverse possession violate the King's private property the same must be true as to the private property of any other individual. There is, indeed, a like violation; but in the case of other individuals the law and the courts, conceding the violation, declare that public policy requires that the negligent individual should suffer to that extent in order that there may be repose in titles and a feeling of security in those who have uninterruptedly held or tilled the soil for a long period of time and constitutions generally and those of these islands in particular have contained no inhibition to the contrary. In the case of the King, however, there was during the period in question, such an express inhibition. Hence the distinction.

What the "more enlightened view" of today is, should not be permitted to weigh in the construction of language used in 1864. It is to be remembered that we are not here dealing with condi-

tions as they exist at the present day but with a state of affairs existing prior to 1887 while Hawaii was a monarchy. In 1864 when Kamehameha V promulgated his Constitution, the idea was still prevalent among the native Hawaiians of the superiority of Kings over other men and of their being entitled to privileges and immunities not enjoyed by their subjects. Contact with other races had, it is true, already had some effect to the contrary, but that the King was in 1864 still regarded differently from other men is apparent from the Constitution itself. The King could not be sued or held to account in any court of the realm. Art. 40. Other men could. The King's *person* was inviolable. Art. 31. None of his subjects enjoyed that privilege.

In this connection it is well to note that all men were afforded a certain large measure of protection for their persons in the provision, Art. 9, that no person should be deprived of life, liberty or property without due process of law; but after due process of law a man could be deprived of his liberty and even of his life. Art. 39, however, gave the King immunity from any such punishment and from all other harm or injury to his person. So, too, a subject, could, after due process of law, be deprived of his property. In my opinion, Art. 39 was intended to give the King a similar immunity as to his property and to render it incapable of being taken away from him or injured or destroyed by any method. Section 39, as well as Article 31 where the same word "inviolable" is used, must have been intended to secure to the King in his private capacity privileges and immunities, as to his property and as to his person, not enjoyed or possessed by other men; otherwise those provisions were wholly unnecessary, for, regarded purely as a private individual, the King would be one of those persons referred to and protected by other clauses of the Constitution.

That the acquisition of title by adverse possession is in fact an injury to the rights of the real owner and a loss to him, has been repeatedly recognized. For example, in referring to the maxim, *nullum tempus occurrit regi*,—a maxim not to be confounded, of course, with the constitutional provision under consideration—

Angell in his work on Limitations says, at p. 31: "It is sometimes asserted that the reason of the above maxim is, that the King is always busied for the public good; and, therefore, has not leisure to assert his right within the time limited to subjects. The true reason, it has been thought, however, is the great public policy of *preserving* the public *rights*, revenues and *property* from *injury* and *loss* by the *negligence* of public officers." See also Lessee of *Cincinnati v. Church*, 8 O. 310. In weighing and applying the evidence in support of such a title, the acts of the *wrongdoer* are to be construed strictly and the *true owner* is not to be *barred* of his *right* except upon clear proof."—*Cook v. Babcock*, 11 Cush. 206. "In the first place, inasmuch as the title of the true owner may, by the application of this statute, be often *divested* by the *wrongful* act of another, the law is stringent in requiring clear proof of the requisite facts."—3 Wash. R. P. 135. In *Bicknell v. Comstock*, 113 U. S. 152, the court quoted with approval from *Leffingwell v. Warren*, 2 Black, 599, the statement that "the lapse of time limited by such statutes not only bars the remedy, but it *extinguishes* the *right* and *vests a perfect title in the adverse* holder." Adverse possession is "an actual, visible and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such *invasion* of the *rights* of the opposite party as to give him a cause of action."—1 Am. & Eng. Encycl. Law, 2nd ed., 789. See also *Barrell v. Title Guarantee Co.*, 27 Or. 81.

The contention that by Article 39 it was intended merely to restrain the King from disposing of the Crown Lands injuriously to the public, is untenable. The provision was intended for the protection of the King and not of the public. The public lands were sufficiently protected by the maxim "*nullum tempus occurrit regi.*" Was it not natural in framing the Constitution to wish to extend or reserve a similar exemption to the King's private property, in view of the idea then prevailing among the native Hawaiians as to the rights of Kings and

partly also because the King was supposed to be busied with the affairs of state?

In *Harris v. Carter*, 6 Haw. 209, Associate Justice Judd said: "I understand that there is no prescription against the State * * * but the King as an individual cannot claim this immunity. *Nullum tempus occurrit regi* means the King as representing the Government and as guardian of the lands of the state." Of this it is to be observed that it was the opinion of a single judge,—entitled, no doubt, to weight—and more particularly that the statement was obviously made with reference to the maxim only. The constitutional provision, so far as the decision shows, was not called to the judge's attention nor did he refer to it in any way.

In my opinion, the title of the King was, until July 7, 1887, the date of the adoption of a new Constitution in which the provision in question did not appear, incapable of being divested or extinguished by adverse possession or by the operation of the statute of limitations, and the statute did not run against him during that time.

The exceptions should be sustained and a new trial ordered.

In re the Guardianship of ANNA T. K. PARKER.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 27, 1902.

DECIDED JULY 25, 1902.

GALBRAITH AND PERRY, JJ., AND W. AUSTIN WHITING, ESQ., OF
THE BAR, IN PLACE OF FREAR, C.J., DISQUALIFIED.

Guardians or trustees in this Territory are not restricted in the investment of trust funds, to public securities or real estate mortgages. Investment of trust funds in the bonds of private industrial corpora-

tions may be made where such bonds are amply secured by mortgage deed of trust on real estate and personal property and are regarded with favor by prudent men seeking investment of their own funds.

The condition in a trust deed securing bonds requiring the assent of a majority of the bond-holders to compel the trustees to proceed to foreclose for default in the payment of interest on the bonds does not in the absence of express stipulation in the deed take from the minority or single bond-holder the right to pursue the usual remedies in a court of equity.

This majority consent clause is not a delegation of authority by a trustee who buys such bond.

A purchase of bonds by a guardian of a minor from a corporation of which he is the treasurer and a director is voidable at the election of the *cestui que trust*.

OPINION OF THE COURT BY GALBRAITH, J.

This appeal is from the decree of a Circuit Judge of the First Circuit Court surcharging a guardian with the amount of certain investments of the ward's funds as shown by his annual account.

It appears that the ward, Anna T. K. Parker, is now eight years old and that the value of her personal property and annual income was found by the Master to be in the neighborhood of \$300,000, that the second annual account of her guardian, Alfred W. Carter, filed November 15, 1901, shows loans and investments in the sum of \$54,250.00; that this account discloses certain investments in the bonds of local industrial corporations as follows: 27 bonds of the McBryde Sugar Co., Ltd., \$26,960, and 4 bonds of the Waialua Agricultural Co., Ltd., \$4,050, and 2 bonds of The Oahu Railroad & Land Co., Ltd., \$1,500, total of \$32,510.00; that the account was referred to a Master who later reported recommending that the same be approved as filed; that the court referred the account back to the Master with instructions to take testimony and to make further investigation into the character of the security for the several bonds in which

the guardian had invested the funds; that after taking testimony the Master filed a supplemental report in which he recites that "the property of the Waialua plantation appears to be worth about \$3,500,000 and to be good security for a loan of \$1,000,000," and that "the property of the McBryde plantation appears to be worth not less than \$2,000,000 and to be good security for a loan of \$750,000," and that the bonds in both cases are secured by first mortgage deeds of trust; that the issue of bonds in the first company was for one million dollars and in the latter for seven hundred and fifty thousand dollars; that the court refused to approve the Master's report and caused additional testimony to be adduced whereupon the Court found the accounts to be "correct and in order except in one particular, namely, in respect to the investment of the sum of \$27,000 in bonds of the McBryde Sugar Company, Limited," and approved the accounts in all respects except as to the bond investments; these were disapproved and the guardian was surcharged with the amount of the investment (\$32,510), also with interest thereon at the rate of six per centum per annum from the date of the respective investments; that neither before the Master nor before the Court was any testimony adduced as to the security for the Oahu Railway and Land Company's bonds except the admission that they were secured by deed of trust in form similar to that securing the plantation bonds; that from this order the guardian appealed and to represent the ward pending the appeal the Court appointed a guardian *ad litem*.

The decision of the Court below was based upon two grounds, namely, (a) that the common law rule forbidding the investment of trust funds in any securities except real estate mortgages and public bonds was in force in this Territory, and (b) that on account of the form of the trust deed the guardian in making the investment violated the rule forbidding a trustee to delegate his authority, also the rule forbidding the mingling of trust funds.

Much was said at the argument and in the brief in this Court on collateral subjects. We cannot be expected to speculate or calculate the probabilities or chances, under certain supposed or

fancied conditions, of disaster or misfortune overtaking certain industrial enterprises of this community or to speculate on the motives that would prompt men to certain action under certain fancied conditions. All these might be interesting and instructive themes for the philosopher, publicist or moralist, but they are not in issue on this appeal and we do not care to announce a dictum upon any one of them. Is the common law rule relied on by the Court below in force in this Territory? It is admitted that there is no statute in this Territory restricting the investment of trust funds. The common law of England was not formally adopted in these islands until 1893 and then only so far as it was not contrary to "judicial precedents and Hawaiian national usage." Prior to that time the courts of these islands were free to adopt or reject the rules of the common law. *Branca v. Makuakane*, 13 Haw. 499, 505.

It does not appear from any of the reported decisions of this Court that the rule of the common law relied on has ever been adopted in these islands. It does appear that the rule has been specifically denied and that in a contested case the court refused to adopt or follow the rule, *In re Estate of Banning*, 9 Haw. 453, 461, 462, and announced the more liberal rule of a number of the states as follows, "No statutory provision limiting the investment of trust funds to specific securities existed in the Hawaiian Islands, and this Court cannot go further than to hold that the trustee must act with honesty, prudence, faithfulness, and exercise a sound discretion in placing trust funds for investment." p. 462.

It is contended that the decision in the Banning case is not binding authority for the reason that it was rendered prior to the annexation of the Hawaiian Islands to the United States and that none of the decisions of this Court rendered before annexation are controlling except those construing statutes continued in force by the Organic Act or such as may have become rules of property.

This is not the view that this Court as now constituted has taken of those decisions. Nor is it the view of the United States

District Court for the Territory or the United States Circuit Court of appeals for the Ninth Circuit. (See *The Schooner Robert Lewers Company v. Kamaka Kekauoha*, 114 Fed. 349). It was held by the former court, in the case last cited at *nisi prius* and by the latter court on appeal that a decision of the Supreme Court of the islands rendered in 1860, contrary to the common law, (sustaining an action by the widow for damages for the death of her husband, no such action could be maintained at common law,) was a part of the law of the Territory of Hawaii. What the court of appeal said in that case is pertinent here.

"As will have been observed, the Supreme Court there expressly declared: 'The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom.' Such judicial modification of the common law the legislature of Hawaii has expressly sanctioned and ratified by section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was in turn sanctioned and ratified by section 1 of the Act of Congress of April 30, 1900, above set out. There was therefore statutory authority for the right asserted and sustained by the court below." *Id.* p. 854.

The rule in regard to the investment of trust funds as announced in the Banning case has been the law of this jurisdiction on that subject since the date of the decision, (April 25th, 1894) and will continue such until overruled by this Court or until a different rule is made by legislative enactment.

Much unpleasant criticism has been made of the decision in the Banning case. We are inclined to think that the greater part at least of this is unwarranted. The doctrine there announced is not new nor is it novel. It has been the law in some of the states for half a century and has been approved by the Supreme Court of the United States. Mr. Justice Gray in speaking for that court said: "The general rule is everywhere recognized, that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions no attempt has been made to establish a more definite rule; in others, the

discretion has been confined, by the legislature or the courts, within strict limits." *Lamar v. Micon*, 112 U. S. 452, 465.

In this opinion the decisions of the Supreme Courts of the several states and the rule announced therein up to that date (1884) are reviewed. From this it appears that the rule announced in the Banning case is followed in Massachusetts, Rhode Island, New Hampshire, Vermont, Maryland and Georgia.

We do not share the fear expressed by counsel for the dire disasters that are predicted to threaten wards and their estates unless the investment of their funds is restricted to public securities and real estate mortgages. The rule of the Banning case has been the law of this jurisdiction for at least eight years. The practical working of the rule for this period has not verified the predictions of evil made against its operation. If trust funds have been dissipated and lost by reason of this rule our notice has not been called to specific instances.

In view of these facts and the absence of any government securities in this jurisdiction for the investment of trust funds and the general commercial, industrial and agricultural conditions prevailing here we do not realize that there is any pressing necessity for a change of the rule.

One of the investments approved in the Banning case was in bonds of the Kahuku plantation and another was in the bonds of the Oahu Railway and Land Company—the last being the same bonds that were disapproved by the court below in this case. The question was not raised in the Banning case as to the form of the trust deed nor was it discussed by court or counsel. From the fact that it appears in this case that the trust deed securing the Oahu Railway and Land Company bonds contains the same provision as the plantation bonds we assume that there was the same form of trust deed in that case as this. The McBryde bonds, and the others are in like form, recite that they are "first mortgage coupon bonds" and are payable to bearer, in United States Gold Coin at the office of the company, Honolulu, on July 1st, 1910," "and bear interest at the rate of 6% payable semi-annually and that they are secured by a mortgage deed of trust

covering the property of the plantation real and personal. They are in the form of negotiable security as are the coupons attached thereto. The trust deed recites the authority and purpose for its execution, the form and number of the bonds and coupons, the name of the three trustees and the certificate to be endorsed on the bonds by the trustees, and conveys to the trustees the property of the plantation set out in detail and recites the purpose of the conveyance to be "for the security and benefit of the holders of the bonds above mentioned and herein secured to be paid, and also for the like interest and benefit of all others interested in said bonds or the property to be hereby conveyed" and that the grantor—the McBryde Sugar Company, Limited, is authorized to maintain possession of the property until after default in the payment of any of the bonds or interest thereon or any part thereof. The first condition of the bond provides that if default shall be made in the payment of interest on the bonds after demand, or if there shall be a breach of any of the conditions of the bond and such breach shall continue for a period of three months, or interest remain unpaid after demand for said period that the trustees or their successors or assigns "may, and upon demand made against the grantor or its agents, shall be permitted to take" charge of the property and operate the same for the purpose of paying the interest from the surplus after paying operating expenses.

The second condition is that if the trustees shall take possession under the first condition and they may deem it best not to operate the plantation then they may sell the entire property at public auction and apply the proceeds of sale as directed in the trust.

The fourth condition provides that "the power of sale hereinbefore set forth is in addition to the right of entry and foreclosure as now provided by law for mortgage foreclosure, or for any rights or authorities under proceedings in equity for such foreclosure; and nothing in this deed contained shall prevent the trustees, their successors or successor from proceeding under the

terms of this deed or the ordinary foreclosure proceedings as above mentioned."

The sixth condition is that "In case of default in the payment of interest on any of the bonds hereby secured, the coupons therefor having been presented and payment demanded, should such default in payment continue for the period of three months after such demand, then and thereupon the principal of all of said bonds, outstanding and unpaid shall, at the option of the holders of a majority of the said bonds, signified in writing, become immediately due and payable, provided that non-action of any of said bond-holders in case of any default shall not extend to and shall not affect, any subsequent default or any right arising therefrom."

This sixth condition it is claimed renders it impossible for the trustee (guardian) to foreclose or to collect the principal of the bond upon default of interest and that it is a delegation of his authority to the majority of the bond-holders and places it beyond his power to act upon his own motion as he is required to do by the terms of the trust. Is this position correct?

Judge Gresham, speaking for the United States Circuit Court for the District of Indiana, in construing a similar provision in a trust deed, said: "The Chicago & Alton Company agreed to pay interest on each bond, and it conveyed its property to trustees for the 'benefit, security, and protection of the persons and corporations, firms, and partnerships who should hold the bonds and interest warrants aforesaid, or any of them, for the purpose of enforcing payment thereof according to their tenor and effect.' The power of a majority to control proceedings to foreclose for the payment of principal when it shall become due, at the election of a majority before maturity in 1920, is not exclusive of the right which a single bond-holder has to enforce the security for the non-payment of any installment of interest on any bond. This right of a minority or even a single bond-holder, does not depend upon the consent of a majority. If it did, the company might refuse to pay interest on the bonds held by a minority until maturity according to their terms, and even after that time,

if some of counsel for defendant are correct in their position that neither before nor after maturity can the trust be enforced without the consent of at least a majority. The right which is asserted by the majority must be found in plain and explicit terms in the mortgage or it will not be recognized. It cannot exist by mere implication." *Farmer's Loan & Trust Co. v. Chicago & Alton Railway Co.*, 27 Fed. 146, 152, 153.

The Supreme Court of Pennsylvania said on this question: "When default occurs, the duties of the trustee become active and important. He represents all the bond-holders, and is under obligation to protect them so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move, any bond-holder may proceed by bill filed on behalf of himself and other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate. The bonds are not payable to the mortgagee, but to the bearer; they are not specialties but negotiable instruments, passing from hand to hand by delivery or endorsement; they find a market in all parts of the civilized world, and are held as an investment in moneyed institutions and by private persons. The mortgagee has no right to the custody of one of the bonds unless he buys it like any other investor, and they furnish him no choice of remedies. He is shut up to the remedies provided by the mortgage and those which the courts of equity may afford him for the purpose of bringing the mortgaged property to sale." *Commonwealth v. Susq. & Del. River R. Co.*, 122 Pa. St. 306, 319, 332.

"The trustee, as mortgagee," says the Supreme Court of Minnesota, "representing the interest of all the bond-holders as beneficiaries, is the proper party to institute foreclosure proceedings, but, if he unreasonably neglects or refuses to discharge his duty in the premises, doubtless any bond-holder may bring an action to enforce the security for the common benefit." *Seibert v. Minneapolis & St. L. Ry. Co.*, 52 Minn. 148, 156.

"It is plain that the principle which is gaining some ground, that a majority of the bond-holders are to rule, cannot be applied in all cases. Each bond is a separate contract with the

holder of the bond. The corporation may elect to pay some bond-holders and to postpone others; and if they pay all of the bond-holders but one, can it be said that he is precluded from proceeding with whatever remedies the law would otherwise give him. In the Supreme Court of the United States, where this convenient but often unjust doctrine of the right of the majority of the bond-holders to rule has sprung up, the clearest and strongest expressions can be found of the rights of the single bond-holder. In a well-considered case in that court, where the terms of the mortgage declared that the conveyance was for the purpose of securing the payment of the *interest* as well as the *principal* of the bonds issued under it, and declared that the mortgagor's right of possession should terminate upon a *default of the payment of the interest*, as well as the principal of any of the bonds,—the court took the view that, independently of the provisions of the other articles, the trustees of the mortgage, or, on their failure to do so, *any bond-holder*, on the non-payment of *any* installment of interest on *any* bond, *might file a bill for the enforcement of the security*, by the foreclosure of the mortgage and sale of the mortgaged property, 'This right,' said Justice Matthews, 'belongs to each bond-holder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by, and in the name of the latter; but, if necessary, may be prosecuted without, and even against, them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms.'" 5 Thompson on Corporations, Section 6122. *Chicago Railway Co. v. Fosdick*, 106 U. S. 47, 68. *Dupee v. Rose*, 10 Utah, 305, 309.

It is true that there are statements made in the text books of abstract principles and the opinion in 39 L. R. Ch. Div. quoted in the decision of the court below, seems to support the contention of the guardian *ad litem*. However, no decision has been called to our attention, and the exhaustive research of counsel justify the inference that if there had been such decision it would have been cited, applying the rule contended for to a provision similar to the sixth condition of the McBryde company trust deed above set out. The authorities above quoted demonstrate clearly that the rule contended for is not applicable to a trust deed in the form of that under consideration. The entire instru-

ment must be considered in its construction. Thus considered it appears that the deed was intended to protect the interests of the bond-holders, not that of a majority only but of the minority as well, and that it does not take away, or attempt to do so, from the bond-holder the usual and ordinary remedies, available to all in proper cases in a court of equity.

The trust deed is in the form demanded by commercial usage and by persons who seek investments in such securities. To sustain the contention of the guardian *ad litem* would be to deny the right of guardians and trustee to invest in such securities although we might know them to be as safe as government bonds. We are unwilling, even if it were admitted that there was in this case a technical delegation of authority by the guardian, to pursue a technicality to that extent. The rule requires that the trustee shall act honestly and discreetly and shall only invest in such securities as prudent men select when seeking investment of their own funds.

If the property covered by the trust deed is ample to secure the payment of the interest and principal of the bonds at maturity and is sufficient to commend them as safe investments to men of ordinary prudence and business judgment the guardian was justified in making the investment.

We do not understand that it makes any difference in the application of the rule relating to the investment of trust funds, in the absence of statute or rule of court, whether the trustee is testamentary or conventional except that in the former case the rule may be enlarged or restricted by the terms of the will.

If the bonds of industrial corporations are excluded, the field for the investment of trust funds in this jurisdiction is limited to real estate mortgages. There are no government or municipal bonds available within this Territory. If the question presented was one of "first impressions" this reason would, perhaps, appeal more strongly to the legislature than to the courts but the question in the case at bar is of changing a rule adopted after careful consideration and in operation for years without known disastrous effects and we consider this fact entitled to consideration.

On the question of the sufficiency of the security for the McBryde bonds. We will state without going into detail that we consider the evidence was ample to show that the property conveyed by the trust deed is sufficient security for the 750 bonds issued and the interest thereon.

As to the Waialua bonds the evidence was too meager to warrant a judgment and we express none. The evidence taken in the Bishop Estate matter and referred to in the decision of the court below was not made a part of the evidence in this case and was not considered. If there is any reasonable doubt in the mind of the court below as to the sufficiency of the security for those bonds that matter should be further investigated.

The objection to the investment in the Oahu Railway & Land Company bonds was based upon the form of the trust deed given to secure them. We have held that these objections were not well taken. The court below said relative to the value of the security for these bonds: "There is no evidence of witnesses before the court as to the financial standing of that company, but the court has had reference to newspaper and stock exchange reports covering a considerable period of time, as to the market value of its stock and bonds, from which it appears that its bonds have been for many months and are now selling above par and that its stock, while now selling at a little less than par, has frequently sold above par. Both are held in high repute." From this we infer that the court below would have approved this investment but for the form of the trust deed.

A further objection is urged that is fatal to a part of the investments. It appears that the guardian purchased at private sale seventeen of the McBryde bonds of the American Sugar Company, a corporation of which he was, at the time, a director and treasurer.

The court below said on this point: "The rule is inflexibly established that where in the management and performance of the trust, trust property of any description, real or personal property, the trustee cannot without the knowledge and consent of his principal directly or indirectly become the purchaser. Such

a purchase is always voidable and will be set aside on behalf of the beneficiary, unless he has affirmed it after obtaining full knowledge of all of the facts. It is entirely immaterial to the existence and operation of this rule that the sale is intrinsically a fair one, that no undue advantage was obtained, or that a full consideration is paid or even that the price is the highest which could be obtained. The policy of equity is to remove every possible temptation from the trustee. The rule applies just as forcibly where the trustee acts, as in this case, simply as the agent for another. 2 Pomeroy, 958. As a director and as the treasurer of the American Sugar Company, it was the duty of Carter to exercise an impartial and unbaised judgment as to the wisdom of a sale of the McBryde bonds; as the guardian of this minor it was also his duty to exercise a like impartial and unbaised judgment as to the wisdom of the purchase of the bonds by him as the trusted guardian of the interests of his ward."

It is no defense to this act of the guardian to say that he acted in good faith and that the other directors concurred in the sale and that no injury resulted to the estate. This is admitted. The trustee cannot purchase property for his *cestui que trust* from himself. The purchase of these bonds from the American Sugar Company, of which the guardian was treasurer and a director, violated a settled rule of law and the purchase cannot be approved over the objection on behalf of the ward. "The general principle," says the Supreme Court of Wisconsin, "upon which this proposition must rest, is that no man can faithfully serve two masters, whose interests are in conflict. And as men usually and naturally prefer their own interests to those of others, where one attempts to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity." *Pickett v. School District*, 25 Wis. 551, 553. "The general rule on this subject is, when a trustee of any description, or a person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled, as a matter of course, at his election, to have the sale affirmed or set aside."

Borders v. Murphy, 125 Ill. 577, 583; see also, *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Litchfield v. Cudworth*, 15 Pick. 23, 31; *Tomaine v. Hendricksen*, 27 N. J. E. 162; 27 *Am. & Eng. Encyc. Law*, 195, 196, 202; *Christley v. Magoon*, 13 Haw. 402; *Hitchcock v. Hustace*, 14 *Id.* 232.

The decree appealed from is reversed except so far as it relates to the seventeen McBryde bonds purchased of the American Sugar Company and as to that it is affirmed and the cause remanded for such further proceedings as may be necessary or proper, consistent with the foregoing opinion.

Robertson & Wilder and *Hatch & Silliman* for the guardian.
J. J. Dunne, guardian *ad litem*, in person.

CONCURRING OPINION OF PERRY, J.

The English rule referred to in the foregoing opinion, that trust funds may not be invested otherwise than in government bonds and real estate mortgages, was not, as I understand it, a part of the common law, but merely a rule adopted by the courts of chancery in the exercise of their discretion and in the enforcement of the fundamental principle that such investments should be only in the safest securities. See 11 *Am. & Eng. Encycl. Law* 815; *Woerner on Guardianship*, Sec. 63, p. 211. If this view is correct, Section 5 of the Judiciary Act of 1892, which enacted the common law of England, with certain stated exceptions, as the common law of Hawaii, has no application in this matter, and the court was, in 1894, in the case of *In re Banning*, and is now in this case, in the consideration of the subject, unhampered by any statutory enactment. If, on the other hand, the rule first above referred to, is to be regarded as a part of the common law of England, still the final result is the same. One of the exceptions named in the Act of 1892 is, "except as otherwise * * * fixed by Hawaiian judicial precedent." Prior to the passage of that Act, to-wit, in February, 1890, and in September and again in October, 1892, this court, in the Estate of W. C. Lunalilo (Probate Records No. 2414), permitted and approved the invest-

ment of trust funds in the bonds of at least two industrial corporations, the Wailuku Sugar Company and the Oahu Railway and Land Company, and in the stock of one mercantile corporation, C. Brewer & Company, Limited. Whether or not similar investments were approved in other cases, I am not prepared to say, but sufficient appears to show judicial precedents contrary to the alleged requirements of the common law. In the Banning case, closely contested by eminent counsel as it was, the point was not even suggested.

What the court said in the case last mentioned on the subject of the investment of trust funds, was not *obiter dictum*; it was upon a point directly involved and elaborately argued. It is an insufficient answer to say that the trustee there was acting under a will, for the direction of the will was that investments were to be made "in good securities with lower rates of interest in preference to high rates with corresponding risks." The court did not hold, nor could it well have done so, that this furnished to the trustee greater freedom of action than, in the absence of a will, the law would have allowed.

While concurring in the view that the decisions of this court rendered prior to annexation are binding on the Circuit Courts of this Territory unless and until reversed or modified, I do not think that the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in the case entitled *The Schooner Robert Leivers Company v. Kamaka Kekaoua*, 114 Fed. —, is to any great extent an authority in support of that view. All that the court there decided was that a certain decision reported in 2 Haw. 209 (1860) was a "judicial modification" of the common law of England within the meaning of Section 5 of the Act of 1892 and that therefore the common law rule under consideration in that case did not apply.

Except as modified by the foregoing, I concur in the opinion of the majority.

MARY J. MONTANO v. W. R. CASTLE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 9, 1902.

DECIDED JULY 26, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A party who, with full knowledge of the facts connected with the execution of a contract, accepts a part of the benefits accruing from such contract thereby ratifies the contract as a whole.

OPINION OF THE COURT BY GALBRAITH, J.

This is a bill in equity for an accounting. The Circuit Judge found for the plaintiff and decreed accordingly. The defendant appealed.

It appears from the record that the plaintiff and her husband, A. A. Montano, in December, 1899, were indebted to the defendant in the sum of sixteen thousand dollars, over-due, and secured by trust deed on their property; that the defendant was authorized as agent, for a commission of one thousand dollars, to sell one tract of land belonging to the plaintiff and included in the trust deed for the sum of twenty-five thousand dollars; that a sale was effected and a deed prepared by the defendant reciting the consideration as paid and was sent to the plaintiff by a Notary Public and the plaintiff and her husband executed the same; that no part of the consideration was paid in cash; that the purchaser assumed the \$16,000 mortgage and secured it by a mortgage on the land and the balance of the consideration (\$9,000.00) was evidenced by two promissory notes, one for six thousand dollars and the other for three thousand dollars, due in three years, bearing 7% interest, payable semi-annually and secured by chattel mortgage on a dairy property; that about the

same time the plaintiff bought of defendant a tract of land for twenty-five hundred dollars; that after conveying this land and cancelling the sixteen thousand dollar debt and other indebtedness amounting to five hundred dollars the defendant held for the plaintiff the balance of the purchase money, six thousand dollars, in a promissory note for that amount due in three years bearing 7% interest per annum and secured by a chattel mortgage running to himself as trustee (without reciting for whom he was trustee) on certain leaseholds embraced in a dairy farm and the cows, calves and equipment connected therewith; that the interest on that note was later voluntarily increased by the mortgagor to 8%; that on May 24th, 1900, almost five months after the sale, the sum of seven hundred dollars was paid the plaintiff on this six thousand dollars indebtedness and credited on the note and afterwards the interest for six months was paid and accepted by her; that the plaintiff after repeated demands and a failure to obtain the balance due of five thousand three hundred dollars commenced this proceeding for an accounting.

The principal question in the case is one of fact and the testimony is at variance. The agency to sell is conceded but the authority to sell on credit or to accept the six thousand dollars of the proceeds in the chattel mortgage is denied.

It is contended by the plaintiff that she only authorized a sale for the cancellation of the sixteen thousand dollars mortgage and the balance cash; that she did not authorize a sale on credit or the investment in the chattel mortgage or agree to accept such mortgage; that she never ratified that investment but specifically repudiated it as soon as she learned that it had been made; that she did not accept the seven hundred dollars payment or the interest with the idea or intention that she was ratifying or approving the investment and only thought that by accepting said sums she was taking a part of the balance of the purchase money due on the sale of her property and on deposit with the defendant.

The defendant contends that he was specifically authorized to make the sale as it was made and to accept the chattel security by the plaintiff's husband who was duly authorized to act as her

agent for that purpose; that the plaintiff when notified of the sale and investment at the time was satisfied with it and subsequently ratified it by accepting the seven hundred dollars payment on the principal and the interest and only became dissatisfied later because she had changed her mind; that he had held A. A. Montano's general power of attorney and had sustained friendly business relations with both plaintiff and her husband for a number of years past. That the price for which the land was sold was very high and that he was only enabled to obtain that price by accepting the chattel security; that the plaintiff and her husband both knew and authorized the sale to Achi, the purchaser, and were well acquainted with his financial condition and knew that he could not pay cash for the land.

The defendant had no written power but acted on oral instructions given by A. A. Montano and relies on this and subsequent ratification by plaintiff.

The evidence justifies the inference that the plaintiff knew of the entire transaction on January 3rd, 1900, that the mortgage was exhibited to her then and she read it carefully and the only objection made at that time was to one item of the property set out in the schedule; that in February following a statement of account from the defendant showing this mortgage as an investment made at his request was delivered to A. A. Montano in whose name the account had been kept in defendant's books up to that time; that on May 24th, 1900, she accepted \$700 on the principal of the debt and accepted the interest for the first six months and that the rate of interest on the note was changed from 7% to 8% at her solicitation; that if the plaintiff did not authorize the taking of the mortgage she afterwards with full knowledge of the facts ratified the acts of the defendant in accepting it.

If the plaintiff was dissatisfied with the security it was certainly her duty when the facts came to her knowledge on January 3rd, to have made her objections known and if they were not satisfied to have repudiated the entire sale. She cannot be permitted to accept the benefit of the sale so far as she may consider it to her advantage to do so and repudiate the remainder.

The contract of sale must be accepted as a whole or repudiated in its entirety.

We do not think that the evidence sustains the finding and decree of the Circuit Judge.

The decree appealed from is reversed and the cause remanded with direction to dismiss the bill.

L. Andrews and *F. Andrade* for plaintiff.

W. R. Castle in person, *P. L. Weaver* and *W. L. Whitney* for defendant.

T. R. MOSSMAN *v.* S. B. DOLE, C. M. COOKE, HENRY HOLMES, C. M. HYDE, J. O. CARTER, S. M. DAMON, W. F. ALLEN and W. O. SMITH, Trustees of the Bernice Pauahi Bishop Museum, DAVID KAWANAKOIA and JONAH KALANIANAOLE.

ORIGINAL.

SUBMITTED APRIL 24, 1902.

DECIDED JULY 28, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a statutory action to quiet title, the judgment may, in a proper case, include an award of possession and be enforced by a writ of possession.

Quere, whether an unexecuted judgment for possession stays the running of the statute of limitations.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

This is a submission without action, under the statute, on agreed facts.

The plaintiff brought a statutory action to quiet title October 11, 1899, in the Circuit Court of the Fourth Circuit, against the defendants, the subject of the action being the title to the Ahupuaa of Waipio, covered by Royal Patent 7529 and situated on the island of Hawaii. The plaintiff proposes to show in that action that he is entitled to the title and possession of that land—or at least an undivided part thereof. The defendants are now and were continuously for more than ten years prior to January 1, 1899, in possession of the land holding adversely to the plaintiff. That case is now at issue, as are also many other similar cases, the result of which may depend largely on the questions of law now raised. (These cases, as we understand, have arisen under the same circumstances as that of *Mossman v. Government*, 10 Haw. 421).

The period of limitations for real actions was reduced from twenty to ten years by Act 19, Laws of 1898, which took effect January 1, 1899, with a proviso that the twenty year period should apply as to rights then existing, in actions brought thereon within one year thereafter.

The questions submitted are:

1. May a judgment in an action to quiet title in favor of a plaintiff who is out of possession include an award of possession, and, if so, may process in the nature of a writ of assistance or of possession issue to put him in possession? Or

2. May possession be obtained, if at all, only by means of an action of ejectment?

3. Would a judgment for the plaintiff in the action to quiet title stay the running of the statute of limitations, so as to prevent the defendants in a subsequent action of ejectment from setting up the defense of the statute, which they could otherwise set up?

The defendants contend that the statute relating to actions to quiet title permits an adjudication of the title only and not of the possession and does not permit the issuance and execution of a writ of possession, but that the plaintiff's only means of obtaining possession, in case he should obtain judgment in the

action to quiet title, would be to bring an action of ejectment subsequently, but that it is now too late to do that for the reason that the period of limitations has already run, though it had not when the action to quiet title was commenced and that the judgment alone in that action, not followed by a change of possession, would not interrupt the running of the statute. If that is so, it would of course be a waste of time and money to proceed with the numerous pending actions to quiet title.

The first question is answered in the affirmative. This requires the second to be answered in the negative and renders an answer to the third unnecessary. An answer to the third in the affirmative would make it unnecessary to answer either of the other two.

Without deciding the third question, it may not be out of place to remark that, although the law seems to be settled that the bringing of an unsuccessful action would not stay the running of the statute (*Willard v. Wood*, 164 U. S. 502, 523), and that the bringing of a successful action would stay it for that particular action so that the judgment though rendered and the execution though issued after the expiration of the period of limitation would be effective if the action were begun before that period had expired (*Breon v. Robrecht*, 118 Cal. 469), and although most of the text books and the earlier cases seem to support the view that judgment alone in one action, not followed by a change of possession, would not stay the running of the statute as to another action, yet the cases as a whole as well as the reasoning on the subject seem to leave this last question in great doubt to say the least. The text-writers do not discuss the proposition but as a rule merely cite a few of the earlier cases. Many of the cases contain *dicta* only or else mere rulings without either setting forth the reasoning or citing authorities. In a number of recent cases the courts decline to follow the earlier cases and in some they attempt to show that most of the earlier cases are really not in point. Among the cases *pro* and *con* see *Carpenter v. Natoma W. & M. Co.*, 63 Cal. 616; *Hopkins v. Calloway*, 47 (7 Cold.) Tenn. 37; *Forbes v. Caldwell*, 39 Kan.

14 (17 Pac. 478); *Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Smith v. Hornback*, 14 Ky. (4 Litt.) 232 (14 Am. Dec. 122); *Bright v. Stevens*, 1 Houst. (Del.) 240; *Jackson v. Haviland*, 13 Johns. 228; *Smith v. Trabue*, 1 McLean 87; *Gower v. Quinlan*, 40 Mich. 572; *Barrell v. Title Guar. Co.*, 27 Or. 77; *Snell v. Harrison*, 131 Mo. 495, and *Estes v. Nell*, 140 Mo. 639, overruling *Mabary v. Dollarhide*, 98 Mo. 198; *Oberein v. Wells*, 163 Ill. 101; *Bradish v. Grant*, 119 Ill. 606; *Bailey v. Laws*, 3 Tex. Civ. App. 529 (23 S. W. 20); *Brolaskey v. McClain*, 61 Pa. St. 146. We need not set forth the line of reasoning that commends itself most to us.

As to the first question, it is clear that if the judgment in an action to quiet title may include an award of possession it may be enforced by a writ of possession. Whether the judgment may include such an award or whether, if it does not, a writ of possession may issue, is not so clear. In the nature of the case there are probably no authorities directly in point, for as a rule under statutes relating to actions to quiet title elsewhere, either the statute expressly provides for an award or a writ of possession or else the statutory proceeding is regarded as equitable under the code procedure and consequently as carrying by implication the power which courts of equity undoubtedly have of issuing writs of assistance or possession. Here law and equity forms are kept distinct and the statute in question provides for an action at law only (*Hakalau Pl. Co. v. Kahuena*, 14 Haw. 189, 196), and contains no express provision as to whether possession may be awarded or enforced in favor of one out of possession. The statute must be construed in large measure by itself. Its provisions are set forth in Civ. L., §§1773-6. It is Act 18 of the Laws of 1890, entitled "An Act to provide for the quieting of titles, estates and interests in real property," and reads as follows:

"§1773. Action may be brought in the Supreme Court or in any of the Circuit Courts by any person, against another person, who claims adversely to the plaintiff an estate or interest in real property, for the purpose of determining such adverse claim.

"§1774. Any person may be made a defendant in such action who has, or claims an interest in the property adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

"§1775. If at the time of the commencement of such action the property in question is in the possession of a tenant, the landlord may be joined as a party defendant.

"§1776. If in such action the defendant disclaim in his answer any interest or estate in the property or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs."

Under this statute an action may be brought by one out of possession as well as by one in possession. *Kahoiwai v. Limaev*, 10 Haw. 507; *Ahmi v. Ashford*, 12 *Id.* 12. The title of the statute is broad showing an intention to provide a convenient method "for the quieting of titles, estates and interests" in real property. The first section provides that the action may be brought against any one who claims adversely an "estate or interest * * *, for the purpose of determining such adverse claim." The Supreme Court of California, in construing a similar section said: "It will be noticed that" the section, "which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold." *Landregan v. Peppin*, 94 Cal. 465, 467. The second and fourth sections also refer to "an interest" and "any interest or estate." The statute would seem to be broad enough to permit of a determination of mere possessory interests or rights of possession as well as of titles of the highest order. Section 3 bears out this idea by providing that if a tenant defendant is in possession, the landlord also may be joined as a party defendant. That would no doubt be the case without express provision, but it emphasizes the intention or thought of the legislature that the statute should be convenient and broad, and tends further to show that the recovery of possession was in contemplation in cases in which that remedy was appropriate. If a change of possession could not be awarded or enforced a very narrow construction would have to

be put on the words "quieting," "estate," "interest," "determine," &c. There is nothing in the nature of an action or suit to quiet title that makes such a remedy inappropriate. In statutory actions or suits to quiet title elsewhere, whether regarded as calling for legal or equitable relief, possession is awarded and enforced and the same is true in ordinary suits in equity to quiet title. The action or suit is not in its nature one merely to determine a status or declare a fact for use at some future time. It is designed to afford definite, immediate relief. Nor is there anything in the nature of a writ of possession that makes it inappropriate in an action at law. Indeed, it is peculiarly a legal as distinguished from an equitable writ. It was originally confined to actions at law, and when introduced in equity, it was on the principle that equity when it once acquires jurisdiction on other grounds will do complete justice and to avoid a multiplicity of suits will grant purely legal relief which it could not otherwise grant. If a writ of possession may be issued in a legal action to acquire title, it does not follow that other kinds of relief that are given in equitable suits to quiet title may also be given in a legal action of this nature, such as by injunctions, deeds of confirmation, cancellation or reformation of deeds, &c., for they are purely equitable remedies. See *Flores v. Maka*, 11 Haw. 512.

If, then, the statute is broad enough to cover all degrees of titles, estates and interests, and if there is nothing in the nature of the action or the relief to prevent, why should not the relief by writ of possession be granted in an appropriate case in order to do complete justice and make the statute as effective as it apparently was intended to be? We might reason by analogy from the practice in equity in so far as that is founded on good sense and is not inconsistent with purely legal principles. For instance, in *Root v. Woolworth*, 150 U. S. 401, a decree had been made settling a plaintiff's right and title to a certain parcel of land, and the question was whether under a supplemental bill to carry the former decree into effectual execution, a writ of possession could properly issue. The Court said, on page 412:

"It is said, however, on behalf of the appellant, that the orig-

inal decree only undertook to remove the cloud upon the title, and did not deal with the subject of possession of the premises, and that the present bill, in seeking to have possession delivered up, proposes to deal with what was not concluded by the former decree. This is manifestly a misconception of the force of the original decree, which established and concluded Morton's title as against any claim of the appellant, and thereby necessarily included and carried with it the right of possession to the premises as effectually as if the defendant had himself conveyed the same. The decree in its legal effect and operation entitled Morton to the possession of the property, and that right passed to the appellee as privy in estate.

"In *Montgomery v. Tutt*, 11 California, 190, there was a decree of sale, which did not require or provide for the delivery of possession of the premises to the purchaser. Subsequently the defendant refused to surrender possession, and a writ of assistance was sought by the purchaser to place him in possession of the premises under the master's deed. Field, J., delivering the opinion of the court, said:

"The power of the court to issue the judicial writ, or to make the order and enforce the same by writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. It is true that in the present case the decree does not contain a direction that the possession of the premises be delivered to the purchaser. It is usual to insert a clause to that effect, but it is not essential. It is necessarily implied in the direction for the sale and execution of a deed. The title held by the mortgagor passes under the decree to the purchaser upon the consummation of the sale by the master's or sheriff's deed. As against all the parties to the suit, the title is gone; and, as the right to the possession, as against them, follows the title, it would be a useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a court of equity. When that court adjudges a title to either real or personal property, to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided.' "

Oberein v. Wells, 163 Ill. 101, was a suit to enforce a former

decree which not only settled the title but awarded possession. It was objected that possession could not properly be awarded under the former decree. The court said, at page 111:

"The court having found and decreed ownership, possession was an incident thereto, and was properly decreed. It is the duty of a court of equity having acquired jurisdiction of a cause to grant complete relief and do justice between the parties. * * *

"The power to effectuate its decrees is inherent in the nature of a court of equity. Possession is one of the elements which is necessarily involved in the ownership of real estate. Where a court of equity finds the petitioner to be the owner in fee of premises, it is not obliged to send him to a court of law to get the possession which it has decided he is entitled to." *Harding v. Fuller*, 141 Ill. 308." In *Gormley v. Clark*, 134 U. S. 336, 350, it was said that "the writ of assistance was simply in effectuation of the decree." This case and the Illinois cases arose under the "Burnt Records Act" and were equitable in their nature, but the proceeding was a special statutory proceeding in the nature of an action or suit to quiet title, and the statute, as we understand, merely gave the court "power to inquire into the condition of any title to or interest in any land in such country, and to make all such orders, judgments and decrees as may be necessary to determine and establish said title or interest," &c., and did not expressly authorize awards of possession or the issuance of writs of assistance or possession. The courts seem to have held that such relief could be granted on the grounds that possession was an incident to ownership, that the power to enforce a delivery of possession was a power to effectuate the decree or judgment of title or ownership, and that equity may grant complete relief, legal as well as equitable, once having obtained jurisdiction. In the present case we have no need to resort to the last mentioned ground inasmuch as the action under our statute is legal. But the other two grounds would seem to apply with full force. The words of our statute are similar—"title," "interest," "determine," &c., and the court has inherent power to effectuate its judgments. But we need not rely on the inherent power. The general statute (Civ. L., § 1150) provides, somewhat as did the Illinois special statute, that "the several Circuit Courts shall have power * * * to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to do all such other acts, and to take all other steps necessary.

to carry into full effect all the powers which are or may be given to them by the laws of the Territory, or which may be necessary for the promotion of justice in matters pending before them." See also Civ. L., §§ 1165, 1467.

It is true in *Lewis v. Soule*, 52 Ia. 11, cited by defendants, the court said, in a statutory suit to quiet title, that, "where the defendant is in possession, the action to recover real property is more appropriate, because more effectual. The plaintiff, if successful, becomes entitled to a writ of possession." But the court overruled the contention that the action could not be brought by one out of possession, and in a later case the same court disposed of a similar contention by saying, after referring to *Lewis v. Soule*, *supra*: "We know of no reason or principle of law which stands in the way of the plaintiff, in such a case, uniting a prayer to recover possession with the prayer that the cloud on his title be removed." *Lees v. Wetmore*, 58 Ia. 170.

It is true also that in *Kahoicai v. Limaev*, 10 Haw. 507, the court intimated that equity had more extensive and complete powers in suits to quiet title, but it did not intimate in what respects and overruled the contention that equity alone had jurisdiction. The court said also in the same case, overruling another contention: "Whether," in an action to quiet title by one out of possession, "possession can be obtained except by a writ in an ejectment suit is not before us for consideration." But no opinion was expressed on that question.

Just what the allegations and prayers are in the actions to quiet title we do not know. Whether there should be a specific prayer for possession we need not now say. Authorities elsewhere seem to differ on this point.

The first question is answered in the affirmative. It is unnecessary to answer either of the other two questions, although the answer to the first question requires, as a corollary, a negative answer to the second question.

W. R. Castle, P. L. Weaver, Jr., and Andrews, Peters & Andrade for plaintiff.

Kinney, Ballou & McClanahan and Holmes & Stanley for defendants.

DISSENTING OPINION OF GALBRAITH, J.

The scope of this special statute authorizing the action at law to quiet title is by the majority opinion extended, by implication, beyond its plain terms. To me this construction seems unwarranted.

The statute permits an action to be brought "against another person, who claims adversely to the plaintiff an estate or interest in real property, for the purpose of determining such adverse claim."

The "estate or interest" in property is often a very different thing from the possession. The estate or interest is frequently in one person and the possession or right to possession in another. The statute by its terms does not authorize the trial of the right to the possession but the "adverse claim" to real property.

No case has been cited where a court of law, in a jurisdiction where the distinction between law and equity is maintained in this kind of action, has tried the right to the possession of the property in the absence of a special provision of statute authorizing it. The cases cited where courts have awarded the writ of possession in suits in equity do not even by analogy sustain the construction given this statute. The courts here would issue the writ if the action were brought on the equity side of the docket. Still I take it that this would be no justification for a court of law in doing it.

It was said by this court: "Although equity has cognizance of suits to quiet title in lands with more extensive and complete powers, the legislature has seen fit to confer upon certain law courts this special right of action. The existence of a remedy in equity does not affect the right of the plaintiff to choose and pursue the statutory remedy. We are not to consider the effectiveness of the statutory remedy, or whether some other form of action would be better suited to this case, provided plaintiffs here have substantially followed the statute." *Kahoivai v. Limaev*, 10 Haw. 507, 509.

It does not appear in what respect the equitable action can be

“more extensive and complete” if in the law action the court can try the right to the possession and award the writ of possession. If that be true the law action is more extensive and complete or may be so for the reason that in the law action the right to a jury trial is available.

The fact that the construction contended for by the defendants would give the statute a narrow scope is no argument against its correctness since it gives it as wide range as the language used seems to warrant.

If the legislature intended by this statute to confer on “certain law courts” as extensive jurisdiction as that possessed by courts of equity in this action such intention is not plain and clear from the language employed. Legislatures in other jurisdictions have expressly given the extended powers to law courts by the terms of the statute and these statutes were in existence in 1890, (the date of the enactment of the statute) and are presumed to have been known to the legislature here. In view of these facts I am forced to the conclusion that if it had been intended to give this law action to quiet title the broad and comprehensive scope it has in equity language would have been employed leaving no doubt as to such intention.

The writ of possession may be peculiarly a law writ but if it issues in the law action to try title it is by virtue of the inherent powers of a court of general jurisdiction “to do full and complete justice” over a subject matter before it. Such power ought not to be claimed for a law court in a Territory where the distinction between actions at law and suits in equity is still maintained. The right of the law court to try the action is given by statute and its powers should be confined within its plain terms.

J. ALFRED MAGOON, Trustee for Sophie K. Wiley and J. W. Wiley, and CHUN KIN FONG *v.* C. LAI YOUNG.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 16, 1902.

DECIDED JULY 28, 1902.

As a rule, in equity, *cestuis que trust* should be made parties to suits by trustees.

OPINION OF THE COURT BY FREAR, C.J.

This bill in equity alleges in substance that on October 28, 1889, one Pomaikai sold to Sophie K. Wiley certain land but that by mutual mistake the land described in the deed was different from that intended, and that afterwards, on March 15, 1899, said Sophie K. Wiley, with the consent of her husband, J. W. Wiley, made a similar mistake in attempting to convey her right, title and interest in and to the land to the plaintiff J. Alfred Magoon as Trustee; that afterwards, on June 18, 1900, the defendant obtained a deed of all Pomaikai's interest in the land without consideration and with notice of the mistake and, on April 12, 1901, brought ejectment for the land against said Sophie K. Wiley and the plaintiff Chun Kin Fong, a lessee; that said Sophie K. Wiley entered into possession when she purchased and has ever since been in possession. The prayer is for a conveyance to the plaintiffs by the defendant of all the interest acquired by the latter in the land, and for an injunction. The defendant demurred on numerous grounds. The Circuit Judge sustained the demurrer without stating on what grounds, and the plaintiffs appealed.

One ground of demurrer was the non-joinder of the *cestuis que trust*, Sophie K. and J. W. Wiley. This ground was well taken. The rule is that in equity *cestuis que trust* should be

made parties to suits by or against trustees. This follows from the more general rule that all persons materially interested in the event of the suit or the subject matter should be made parties. The rule has some exceptions, but this case does not fall within them. It is easy to see that the *cestuis que trust* in this instance are materially interested. For instance, not only are they interested in the question whether the conveyance should be made at all, but they may have ground for showing that it should be made to them or one of them instead of to the trustee. Again, the result of the suit might be that the trustee would be obliged to convey back to Pomaikai the land alleged to have been conveyed to them by mistake, on the principle that he who seeks equity should do equity. It may be noticed in passing that no offer to do this is made. The necessity that may arise for doing this, to say nothing of other considerations, suggests whether Pomaikai also should not be made a party.

It will not be necessary to review all the grounds for demurrer. The plaintiff has not argued them specifically. Many of them are such as can be easily remedied, if they need remedying, in a new bill and, now that they are suggested to counsel by the demurrer, he can look into them as well as the court and act accordingly. The bill is defective, though we need not say whether fatally so, in other respects not covered by the demurrer. It does not appear that the Circuit Judge was requested to state on what grounds he sustained the demurrer or that any request was made for leave to amend.

The decree sustaining the demurrer, dismissing the bill and dissolving the temporary injunction is affirmed subject to the single modification that the dismissal should be without prejudice, and for the purpose of making such modification the case is remanded to the Circuit Judge.

Magoon & Peters and *T. I. Dillon* for plaintiffs.

L. A. Dickey for defendant.

FRANK C. BERTELMAN and HENRY G. BERTELMAN,
v. SUSAN BERTELMAN KAHILINA; HELEN
SMITH, wife of WILLIAM SMITH and WILLIAM
SMITH her husband; ANGELINE MOSSMAN, wife of
HARRY MOSSMAN and HARRY MOSSMAN her hus-
band; MINNA HALL, wife of WILBUR HALL and
WILBUR HALL her husband; HATTIE BANNISTER,
wife of ANDREW BANNISTER and ANDREW BAN-
NISTER her husband.

ORIGINAL.

SUBMITTED JUNE 13, 1902.

DECIDED JULY 29, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A testator devised certain land, which was subject to a 25 year lease at a rental of \$6,000 a year, to his wife, three sons and six daughters, as follows: (1) To his wife a life estate of \$2,000 or, in case of a change in the lease, one-third the net income, and, in case of her death, said \$2,000 a year or one-third to be equally divided among all his children or surviving children, and to each of the children or surviving children an equal share of the remaining \$4,000 or two-thirds of the income; (2) * * * (3) At the expiration of the lease, to his sons or *then* surviving sons or son, the land, provided such sons or son should then pay \$5,000 to each of the daughters or surviving daughters, but, in case one or two of the sons should be unable to pay such amounts within a year from that time, the other son or sons to have the right to buy the whole by paying (a) to each daughter or surviving daughter \$5,000, (b) to the short-coming son or sons each \$5,000, and that by doing so the sons or son will enter into full possession, and their or his right and title be undisputable, provided they comply with the said conditions, and (c) to the wife, a life rent of \$2,000 a year, to be a charge on the estate; (4) Should none of the sons be able to pay these amounts, then the land to be sold or leased again according to the best interests of the family, the proceeds to be equally divided among the children

or their lawful heirs and assigns, after the distributive share of dower is given to the wife. The wife and all the children survived the testator. Held,

The widow took a life estate in one-third the land, subject to be divested upon the performance of the conditions prescribed in the third item, in which case she would thereafter have a fixed sum of \$2,000 a year, which would be a charge on the land.

The children took, subject to the widow's interest, equal estates until the expiration of the lease, with vested remainders in fee, the former merging in the latter so as to make present vested estates in fee, defeasible as to the interests of the daughters and short-coming son or sons upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent executory devises as to such interests.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

The question is one of the construction of a will. The material parts of the will and other facts are set forth in the dissenting opinion of Mr. Justice Perry.

There are three classes of devisees—the testator's wife, his sons, and all his children, comprising three sons and six daughters. The question is, what interests have they under the will?

As to the wife, there seems to be little or no doubt. The first item of the will clearly gives her a life estate in one-third of the land in question. The fourth is in harmony with this. But upon the happening of certain contingencies set forth in the third item her estate may be divested, in which case she would thereafter have in place thereof a fixed yearly sum which would be a charge on the land, to be paid by the son or sons who would take the whole land under that item upon the happening of such contingencies.

As to the children, they have equal vested interests under the first item, subject to the widow's interest, until the expiration of the lease to the Kilauea Sugar Company. The main question is, what have they after that under the third and fourth items?

As to the sons, in so far as they take under the third item, they take, subject to the charge in favor of the widow, a fee—whether

defeasible or indefeasible, vested or contingent, by way of remainder or executory devise, remains to be seen.

If the payments prescribed in that item are conditions precedent, they of course cannot have a vested interest under that item until they perform the conditions, and the vesting of their estates will necessarily be contingent upon such performance. In such case they would take by way of contingent executory devise, to vest and take effect in possession upon such performance and at the same time divest the daughters and short-coming sons or their heirs of any interests that they might otherwise have either under the fourth item of the will or by descent. Whether such other interest would be by devise or descent would depend upon whether the devise in the fourth item would vest at or before the expiration of the lease or on non-payment by the sons within a year thereafter, that is, according to whether the children would take under the fourth item immediately by way of remainder subject to be divested or by way of executory devise a year after, holding meanwhile as heirs.

If those payments are conditions subsequent, the sons take under the third item by way of remainder, to take effect in possession immediately upon the expiration of the lease and to be subject to be divested, upon non-performance of the conditions, in favor of the devisees under the fourth item. Such remainder would be contingent. For, although courts lean strongly in favor of early vesting, they must yield to the clearly expressed intention of the testator. In this case the devise, to take effect in possession at a future time, being to the sons "*or then surviving sons or son*", it is impossible to say until that time arrives which sons, if any, will be entitled to take under that description, and, in order that a remainder may be vested, it is necessary not only that it be capable of taking effect in possession whenever the particular estate may determine, but that there be a person in being and ascertained who answers the description of the remainderman at some time during the continuance of the particular estate and not merely at its termination. 20 Am. & Eng. Enc. of Law, 838 *et. seq.* and notes; 2 Underhill, Wills, § 865.

Here the contingency is inherent in the description of the devisees. There is not even a direct devise to all the sons with a divesting clause or devise over in the event of the death of one or more during the prescribed period.

In any event, therefore, until the expiration of the lease, the sons would have, so far as the third item is concerned, only a contingent interest. And this perhaps would be as far as it would be necessary to go in this case if this item alone were concerned. But it will be necessary to decide what all the children take under the fourth item, and in doing so it will be necessary or at least convenient to say further whether the payments are conditions precedent or subsequent and therefore whether the sons would take under the third item by way of remainder or executory devise.

All the children take a fee, of course, under the fourth item, in so far as they take at all under that item. There is no conversion of the land into money, for the direction to sell is not imperative. Nor does the fact that there is only a direction to sell or lease and divide the proceeds at a future time, without any express devise, prevent there being a devise or even a present vested remainder. 2 Underhill, Wills, § 866.

Under this item the children must take either a vested or contingent remainder or a contingent executory devise. It could not be a contingent remainder; for to be a remainder at all, it would have to take effect in possession, if at all, immediately upon the expiration of the lease, but the only contingency—non-payment by the sons—that would make it a contingent remainder, if at all, might happen at any time within a year after the expiration of the lease.

The estate therefore must be either a vested remainder subject to be divested upon the performance of the condition by the sons or else a contingent executory devise to vest and take effect in possession, if at all, a year after the termination of the lease in case the sons fail to perform the condition within that year. Which is it?

With the exception of the argument based on the direction to

sell or lease and divide at a future time, which, as we have seen, is by no means conclusive, the arguments all seem to favor the theory of a vested remainder as against a contingent executory devise.

In general there is a strong presumption in favor of early vesting. There is a strong presumption in favor of a remainder as against an executory devise. There is a strong presumption against intestacy as to a portion of the estate—in this case for the short period from the expiration of the lease to the performance of the conditions in case they are performed or the end of the year in case they are not performed. There is a strong presumption that a condition imposed merely for convenience is not intended to delay the vesting of an estate, that is, is not intended as a condition precedent to the vesting, even if it should be to the enjoyment. Here the children would take under the fourth item immediately but for the allowance of a year to the sons in which to make the prescribed payments, and that time is allowed for the sons' convenience and not for the purpose of postponing all the children.

The will itself contains nothing to clearly rebut these presumptions but on the contrary supports the view that the children were intended to take immediately upon the expiration of the lease rather than a year later. All three of these items show an intention on the part of the testator to treat all the children equally as to quantity of interest. The first and fourth items express this intention as clearly as it can be expressed. The third item merely gives the sons a privilege of obtaining all the land, but only on condition that they compensate the others for what they would otherwise have in the land. It is little more than one method of division. Accordingly, it would seem that the intention was to leave the land to all, subject to the exercise of the option by the sons, rather than to leave it to the sons subject to go over to all in case the sons should not exercise their option. The third item strongly bears out this idea. It shows that the payments therein prescribed are conditions precedent, in which case the sons could not take by way of remainder at all under

that item. They could take under that only by way of contingent executory devise. The form of the proviso and its annexation to the devise itself, instead of being inserted in a subsequent clause, favor this construction. Moreover, even after the expiration of the lease it may not be known for a year which, if any, of the surviving sons will be able or willing to make the payments. The provision for the payments to the others, the short-coming sons as well as the daughters, also favors this construction. This and the use of the word "buy" tend to show that the testator thought the daughters and short-coming sons already had an interest to be in a certain sense bought out. The sons may buy "the whole", as if they would not otherwise then have the whole, or as if the others already had some. And it is only "by doing so", that "they my sons, or he my son, will enter into *full* possession of *all* my lands, and their or his right and title will be *undisputable*, provided they or he (my son or sons) comply and fulfill the above mentioned conditions." A distinction is made also between the payments to the other children and those to the widow. The latter are merely charges on the land and may extend over a period of years, and no express words of condition are set forth in connection with them, while the former are intended to be single payments respectively to be made within a limited time and are put in the form of express conditions. The sons would then at most take, not a contingent remainder, but only a contingent executory devise under the third item.

Again, if there is any distinguishing feature in the results as between vested and contingent interests, it is that a vested interest passes from the designated devisee to his heirs or assigns, while a contingent interest does not. Now, this distinction between an interest that would pass by descent or devise or conveyance even before the estate might take effect in possession and one that would not so pass, is apparently just what the testator had in mind, as to the estate of all the children under the fourth item, for he there directs the division to be made among all the "children or their heirs and assigns," as if they could devise or convey their respective interests before the period of distribution or tak-

ing effect in possession or as if, in case they did not do so, their interests would pass to their heirs by descent in case of their death before such period. If such is the case, the children must have a vested estate.

The foregoing considerations favor the view that the sons would take a contingent executory devise as against a contingent remainder under the third item; that all the children would take a vested remainder under the fourth item as against a contingent remainder in the sons under the third item; that under both items all the children would take a vested remainder, subject to be divested as to the daughters and short-coming sons in favor of the other sons upon their performance of the prescribed conditions as against the view that all the children on the one hand and the sons on the other hand take alternate contingent executory devises with a possible intermediate period of intestacy.

But since all the children have vested estates until the expiration of the lease as well as vested, though defeasible, remainders after that, the lesser estates are merged in the greater and all the children have present vested estates in fee defeasible as to the interests of some of them upon the others' performance of the conditions prescribed. And this would seem to be the intention of the testator as shown in all three clauses of the will. He meant to give the land to all his children equally, subject to the widow's interest, and, as one method of division after the expiration of the lease, to give the sons the option of obtaining the whole upon making proper payments in money to the others.

The questions are therefore answered as follows:

The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of \$2,000 a year, which will be a charge on the land.

The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and short-coming sons upon the performance of the prescribed

conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interests.

Geo. A. Davis and F. M. Brooks for plaintiffs.

Andreus & Andrade for defendants.

DISSENTING OPINION OF PERRY, J.

This is a submission, under the statute, upon an agreed statement of facts.

On December 12, 1891, one Christian Bertelmann, of Pilaa, Kauai, executed a will containing, among others, the following provisions: "First. In consideration of Agreement and Lease of all my lands (except 100 acres actually fenced off and two acres of taro land at Kahili), made by myself with the Kilauea Sugar Company, Limited, for the term of 25 years, commencing November 1st, 1890 and ending Nov. 1st, 1915, at the rate of \$6,000.00 per annum, payable quarterly in advance, I make the following Arrangements.

"I give, devise and bequeath said rents as follows:

"1st. To my lawful wife, Susan C. Bertelmann, a life rent of two thousand dollars (\$2,000.00) yearly, payable quarterly, being one-third of above mentioned rent of six thousand dollars (\$6,000.00) or in case of any possible change in the actual agreement with the Kilauea Sugar Company, an equivalent of one-third of all net receipts or income of lands now rented to Kilauea Sugar Company. In case of Susan Bertelmann's death the above mentioned income of \$2,000.00 a year, or equivalent of one-third as her distributive share of Dower would be equally divided amongst my children or surviving children.

"2nd. To each and every one of my children or surviving children an equal share of the four thousand dollars (\$4,000.00) or the remaining two-thirds of the total income, deriving from the rent of my lands to the Kilauea Sugar Company or equivalent thereof."

"Third. At the expiration of twenty-five years' lease to the Kilauea Sugar Company, it is my sincere wish and will that my land should befall in equal shares and interest upon my three sons:—Frank Charles, Henry Godfrey and Christian Sylvester Bertelmann or then surviving sons or son, provided, however,

that at such a time these my sons or son, shall to pay to each one of my daughters or surviving daughters the sum of five thousand dollars (\$5,000.00). In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the five thousand dollars (\$5,000.00) per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:—

“1st. To each of my daughters or surviving daughters the amount aforesaid of five thousand dollars (\$5,000.00).

“2nd. To my short-coming son or sons, the same amount of five thousand dollars (\$5,000.00) each, being the same share as will be paid to my daughters. By doing so, they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable, provided they or he (my son or sons), comply and fulfill the above mentioned conditions.

“3rd. To my wife, Susan Bertelmann, a life rent of two thousand (\$2,000.00) per annum, I make the payment of all these amounts above given a charge from all my estate.

“*Fourth.* Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to circumstances and best advantage of my family. The money deriving from said sale or lease will be fully divided amongst my children or their lawful heirs and assigns after the distributive share of Dower will have been given to my wife, Susan Bertelmann according to law.”

By other clauses of the will, which clauses are not now in dispute nor material to be considered, the testator made specific disposition of the one hundred acres and the two acre tracts mentioned in the first clause. The testator died March 15, 1895, being at the time of his death seized of the lands referred to in the will.

Christian Bertelmann left surviving him his widow, three sons and six daughters. The plaintiffs are two of the sons, the defendants Helen Smith, Angeline Mossman, Minna Hall and Hattie Bannister are four of the daughters and the defendant Susan Bertelmann Kahilina is the widow, named in the will as Susan Bertelmann.

The claims of the parties are thus stated in the submission: "That Frank C. Bertelmann and Henry G. Bertelmann claim that they, the said Frank C. Bertelmann and Henry G. Bertelmann, own two undivided thirds in fee simple of the said estate under said will, and the said Susan Bertelmann Kahilina; Helen Smith, wife of William Smith and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, claim that the said Frank C. Bertelmann and Henry G. Bertelmann own no such interest in the said estate, but that they, the said Frank C. Bertelmann and Henry G. Bertelmann own, and are well entitled to, two undivided ninths of the said estate under the said last will and testament of Christian Bertelmann, deceased; that they, the said Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, own and are well entitled to four undivided ninths in the said lands and premises under the said last will and testament of Christian Bertelmann, deceased; that the said Susan Bertelmann Kahilina owns and is well entitled to her dower as set forth in the said last will and testament of the said Christian Bertelmann, deceased."

The questions submitted are:

"1st. What right, title or interest, have the said Frank C. Bertelmann and Henry G. Bertelmann, by, through, or under the said last will and testament of Christian Bertelmann, deceased?

"2d. Further, what right, title or interest have the said Susan Bertelmann Kahilina, Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband, and Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, by, through, or under the said last will and testament of said Christian Bertelmann, deceased?"

On behalf of the plaintiffs the main contention is that the three sons of decedent "took a vested interest in the realty in fee subject to be divested as to any of them in the event of their death before the expiration of the lease or upon their failure to pay the legacies provided in the will" and that their interest was "a vested remainder expectant, subject to a condition, the violation of which would forfeit their estate."

I respectfully dissent from the construction given the will by the majority. It is doubtless an elementary rule of the construction of wills that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested, and that the law favors the earliest possible vesting of estates and favors a remainder as against an executory devise. Still, an interest must be construed to be contingent if it is clearly so expressed and if it is necessary to do so in order to carry out the intention of the testator. So also, under like circumstances, the other less favored constructions must be adopted.

A remainder is contingent "when it is so limited as to take effect to a person * * * not ascertained, or upon an event which may never happen." *Woodman v. Woodman*, 89 Me. 128. In the case at bar, the remainder, if any, is, in my opinion, contingent. The devise expressed in the third clause, to take effect at the expiration of the 25 years lease to the Kilauea Sugar Co., is to the three sons, Frank, Henry and Christian, "or then surviving sons or son." In order to take, each taker must be alive at the time named. It is impossible to ascertain now which one or more of the sons will be alive at that time. There is an uncertainty as to whether any of the sons and as to what one, if any, will ever have the right to the enjoyment of the estate. See *Bailey v. Hoppin*, 12 R. I. 560, 567. For this reason alone, the remainder cannot be a vested one.

The argument is advanced that the remainder must be held to be vested rather than contingent because no disposition of the land is otherwise made for the period prior to the expiration of the lease. This position, I think, cannot be upheld. By the first clause of the will, all of the rents of the land, for the period re-

ferred to, are disposed of for the benefit of the widow and children in stated proportions. This is the equivalent of a devise of the land itself for that time,—an estate for years. See 3 Wash. Real Prop. 382; *Earl v. Rowe*, 35 Me. 414, 419; *Reed v. Reed*, 9 Mass. 372, 373; *Caldwell v. Fulton*, 31 Pa. St. 475, 479.

Another reason for regarding the remainder, if any, as contingent and not as vested, is that the testator has named another condition precedent to the vesting of the estate. Whether that condition will be performed or not, is uncertain. The condition referred to is that the surviving son or sons pay to the surviving daughters and to any delinquent son the sum of \$5,000 each at the expiration of the lease or within one year thereafter. That the provision in question was intended as a condition, is not disputed; but it is contended that the condition is subsequent. Whether a condition is precedent or subsequent is a question of construction to be determined in view of the language of each particular will. As usual, it is the intention of the testator which is to be sought. If from the language used it is clearly evident that the testator intended "that a devisee to whom property is given should perform some act prior to the vesting of the estate, and without the performance of which it will not vest, the condition is precedent. Until it is performed the devisee has no title." See 1 Underhill on Wills, Section 483. In stating what the devise to the sons is, and in the same sentence, the testator in the case at bar says, "provided, however, that at such a time these my sons or son, shall pay to each one of my daughters", etc. Immediately following this is an alternative provision to be good in case one or two of the sons are unable to pay, and that is that the other two or one may have the whole property by paying to the delinquent son or sons as well as to the daughters the sums named. "By doing so", continues the testator, "they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable", again adding, as if to emphasize the point, "*provided they or he (my son or sons) comply and fulfill the above mentioned conditions.*" The obvious meaning of this is that if the conditions are not complied

with, the sons will not have any right or title to the lands under this clause. Proceeding still further, the testator provides for the contingency of *none* of the sons being able to pay. In that event, he says, they are to be "sold at public auction or leased" and the proceeds divided among all the children after dower has been given the widow; in other words, in that event the lands, not yet vested in the sons, are not to go to them alone but to them and to certain other persons.

The intention of the testator seems to me to be clear. In view of the fact, however, that the sons are allowed one year after the expiration of the present lease to the Kilauea Sugar Co. within which to pay the amounts stated, and that a period of time may elapse between the determination of the particular estate and the vesting of the interest of the sons, it may be that the testator's intention cannot be carried out on the theory of a contingent remainder. If that is so, the limitation can, nevertheless, be supported as an executory devise. See 4 Kent Com. p. 264 *et seq.*; 1 Bouvier's Dict. 733; 1 Underhill on Wills, Sect. 874 *et seq.* In the interval, if any, between the determination of the particular estate and the taking effect of the limitation over, the fee will be in the testator's heirs, in the absence of a residuary clause. See 4 Kent Com. 270, 284.

The contention of the defendants seems to be, in effect, that a vested remainder is devised to the daughters, with power to sell to the sons only, and that this restriction upon the power of alienation is invalid. I think that to so construe the language of the will would do violence to the intention of the testator. The mere use of the word "buy" in the first paragraph of the third clause, above quoted, cannot have the effect contended for. The word was there used evidently in the sense of "acquire title to." If the argument of defendants were good at all, that the power or right to "buy" from the daughters presupposes a devise of the fee to the daughters, then such devise would of necessity be regarded as having been to the "short-coming sons" as well as to the daughters. Such a construction, to-wit, that each of the daughters and each of the short-coming sons has a vested re-

mainder, subject though it be to being divested, finds no support in the language of the will. If any vested remainder whatever could be held to have been given, it would be to each of the nine children. The latter however, was not, as it seems to me, intended by the testator. If it had been, then certainly after he had once caused such estates to be vested in each and all of his nine children, he would not have permitted a divesting of any of such interests in favor of some or all of the sons without providing some compensation therefor. Yet, what he said was that the surviving son or sons shall have the whole property, not by paying to the surviving daughters and short-coming sons *and to the heirs of any deceased daughter and to those of any deceased son*, but by paying to the surviving daughters (meaning daughters surviving at the expiration of the lease and not at the death of the testator) and to the short-coming sons only. This strongly supports the view that as between the three sons on the one hand and the nine children on the other the devises were of alternate contingent remainders or, at least, of alternate contingent executory devises. In other words,—and the testator wrote the four clauses in their natural order—if the sons pay the surviving daughters and short-coming sons, they shall have all the property; if they do not so pay, the nine children shall have it all. If the testator omitted to provide, in certain contingencies, for the heirs of deceased sons or daughters, the court cannot remedy the defect. As I understand the majority opinion, it is not therein decided whether or not the condition named in the third clause requires the payment by the surviving sons of \$5,000 to the heirs of any deceased son or daughter in order to defeat what is adjudged to be the vested interest of each son and daughter.

The use of the word “assigns” in the fourth clause is not sufficient, I think, to overcome the indications contained in the other parts of the will showing that the devise was intended to be of contingent interests; nor is it inconsistent therewith. “Heirs” and “assigns” were named by the testator in that clause as persons to take by way of substitution for those dying or assigning, respectively, before that time. A conveyance of a contingent re-

mainder, if for a valuable consideration, would be enforced at least in equity and would operate by way of estoppel to pass the interest or possibility of interest of the grantor to the assignee. There are authorities even to the effect that contingent remainders are alienable. See, for example, *Belcher v. Burnett*, 126 Mass. 230, 231; *Drake v. Brown*, 68 Pa. St. 223, 225.

The questions submitted should be answered as follows: (1) The widow is entitled, (a) to a one-third interest in the land until the expiration of the lease to the Kilauea Sugar Company, (b) in case one or more of the sons pay as provided in clause 3, to a life rent of \$2,000 per annum secured by a charge upon the property, and (c) if none of the sons pay as provided by clause 3, to a life estate in one-third of the land.

(2) Until the expiration of the present lease to the Kilauea Sugar Company, each of the children of the testator is entitled to an equal share of the remaining two-thirds interest in the land.

(3) At the expiration of said lease, the son or sons at that time surviving, will, provided he or they pay \$5,000 to each of the daughters then surviving, and to each of the "short-coming" sons, if any, take the fee of the said lands, either as contingent remaindermen or by way of executory devise, subject to the charge in favor of the widow. In that event, the then surviving daughters and short-coming sons, if any, will be entitled to the sum of \$5,000 each and no more.

(4) During the period, if any, intervening between the expiration of the present lease and the compliance by the son or sons with the condition as to payment, the heirs of the testator will be entitled to the land as provided by law, subject to the widow's right of dower.

(5) If none of the sons comply with the condition of clause 3, then, subject to the widow's life estate, all the land goes to the nine children.

IN THE MATTER OF THE APPEAL OF A. S. HUMPHREYS, FIRST JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, FROM A RULING OF THE AUDITOR CONCERNING THE COMPENSATION OF BAILIFFS.

SUBMITTED AUGUST 21, 1902.

DECIDED AUGUST 25, 1902.

PERRY, J., AND W. O. SMITH, ESQ., AND J. T. DE BOLT, ESQ., OF THE BAR, IN PLACE OF FREAR, C.J., AND GALBRAITH, J., ABSENT.

No appropriation was made by Act 10 of the Laws of 1901 for payment of the compensation of the bailiffs whose appointment was thereby provided for, nor was the Treasurer by that Act authorized to pay such compensation.

OPINION OF THE COURT BY PERRY, J.

This is an appeal by the First Judge of the Circuit Court of the First Circuit, taken under Section 16 of Act 39 of the Laws of 1898, from a ruling of the Auditor.

Under Act 10 of the Laws of 1901, bailiffs have been appointed by Circuit Judges of the Territory. These bailiffs have been paid for their services at the rates specified in Section 5 of that Act, the total amount so paid out of the treasury to date being \$5040. The payments were made, upon warrants issued by the Auditor, out of the appropriation of \$36,000 for "Expenses Supreme and Circuit Courts" made by Section 1 of Act 4 of the Extra Session of 1901. That appropriation recently became exhausted. On the 19th inst. the present appellant addressed a communication to the Auditor, claiming that the payments had been made out of the appropriation last referred to without authority of law and demanding that the sum of \$5040

be credited to that appropriation so that the same might become immediately available to meet the current expenses of the Supreme and Circuit Courts. The Auditor refused to comply with the demand and it was from that refusal that this appeal was taken.

The contention of the appellant is that Section 5 of Act 10, Laws of 1901, contains an appropriation of the sums necessary for the compensation of the bailiffs at the rates prescribed. The question is one of construction. Section 5 reads as follows:

“That the bailiffs appointed under the provisions of this Act shall be paid for their services at and after the following rates, and it shall be the duty of the Auditor of the Territory of Hawaii, to draw a warrant for the same upon the Treasurer of the Territory of Hawaii, upon an order so to do under the seal of the court, of any Judge of the Court by whom any such bailiff may have been appointed, that is to say:

The bailiff of the Supreme Court per month	\$100.00
Additional bailiffs at the rate per day	5.00
The bailiffs of the First and Fourth Circuits per month	85.00
The bailiffs of the Second, Third and Fifth Circuits per month	50.00
Additional bailiffs for the several Circuit Courts, per day, for each day of actual service	3.00”

The title of the Act is: “An Act relating to the appointment of bailiffs for certain courts in the Territory of Hawaii and defining the duties and powers of such bailiffs and fixing the amount of their compensation, and providing for the payment of such compensation.”

It is to be observed, that the section does not expressly, by apt or usual words, appropriate money for the payment of the compensation specified or authorize the Treasurer to make such payment. Such appropriation or authority, if it is made or granted at all by the section, is to be found only by inference from the fact that the section provides the rates of compensation and makes it the duty of the Auditor to draw warrants for the same upon the order of the judge making the appointment. The argument advanced is that the legislature could not have intended to direct the issuance of warrants without also intending that such

warrants should be honored at the treasury; that the provision that the bailiffs "shall be paid for their services at and after the following rates" is in itself an appropriation, and that the last clause of the title of the Act shows that it was the intention of the legislature to make an appropriation in the Act itself.

The inference just referred to, assuming it to be a possible one, is not a necessary one. It would be competent for the legislature to provide in this Act the rates at which certain officers were to be paid and also the procedure necessary to be followed in order to make it the duty of the Auditor to issue warrants, and to leave the making of an appropriation for such payments to another Act. Section 5, standing by itself and reading its language in its usual and ordinary acceptation, does not purport to do more than to fix the rates of compensation and to declare the circumstances under which it becomes the duty of the Auditor to issue the warrants. This last declaration may well have been made,—and we think that it was—in order to place it beyond the power of the Auditor or any "Head of a Department" to prevent the approval or payment of the salaries in question and to leave such approval entirely to the Circuit Judge making the appointment. Under Section 17 of the Audit Act of 1898, the Auditor was directed not to "recognize any claim of whatsoever nature unless a written statement or voucher be presented for the same" and under Section 33 was authorized, with the consent of the Executive Council, to make and publish such regulations not inconsistent with the Act as might be found necessary to carry out its objects and for the more effectual audit of all disbursements of public moneys. By virtue of this authority certain regulations were made and published to take effect July 1, 1898, one of which (No. 1) required, *inter alia*, that there be deposited with the Auditor "by the heads of the several departments," as soon as practicable before the last day of each month, lists of permanent employees of the government receiving regular monthly salaries, such lists to bear "the approval of the head of the department employing such persons," and providing that warrants would be issued by the Auditor upon receipt of such lists. The item for

"Expenses of Supreme and Circuit Courts" appears and has usually appeared under the title, "Judiciary Department"; the bailiffs provided for by Act 10 were to be employees of that, if any, department, and, in the absence of an express provision to the contrary in Act 10, there would have been at least reason for the argument that the bailiffs of the circuit courts would not be entitled to receive warrants for their salaries without first obtaining the approval of the Chief Justice of this Court as the head of the Judiciary Department. Hence the special provision in Section 5.

Act 10, while authorizing the Chief Justice of the Supreme Court and the Circuit Judges to appoint such additional number of bailiffs as may be deemed necessary and while providing the rate of compensation per day for such additional officers, does not limit the amount which may be expended for this purpose during the biennial or any period. This fact furnishes strong reason for believing that it was not the intention of the legislature to authorize, by Act 10 itself, the payment of any of the salaries or compensation named. It is not to be presumed that the legislature intended to leave it to an executive or to a judicial officer to determine, without limitation, the amount to be expended for a certain purpose. We think that the limitation was, as usual, prescribed, and that it is to be found in the item of \$36,000 above referred to appropriated in Act 4 of the extra session.

Much reliance is placed by the appellant upon the clause in the title, "and providing for the payment of such compensation," as showing an intent to make an appropriation. The presence of that clause does, indeed, furnish ground for the argument advanced but is not, in our opinion, sufficient to outweigh the considerations in favor of the view that by the Act no appropriation was made or authority given to the Treasurer to pay. If it was the intention of the legislature to authorize the payment, that intention was not sufficiently expressed in the Act, and it is the intention *as expressed* that is to be ascertained.

If the language of Section 5 of Act 10 is to be regarded as of doubtful construction, assistance is to be found in the fact that

the same legislature which passed the Act within three months thereafter practically construed Section 5. Act 10 was approved on April 26, 1901. On July 18 of the same year, at the extra session, Act 3 was approved, appropriating salaries and pay-rolls. In that Act appears the item, under the title of the Judiciary Department, "Salary Supreme Court Bailiff, \$2400," the total of the salary provided for that officer by Act 10. In the absence of a good showing to the contrary, we must presume that the legislature would not have appropriated this sum for this purpose in the later Act if it had already made an appropriation of the same amount for the same object in the earlier Act. The irresistible inference is that the legislature itself construed Act 10 as not making any appropriation. The explanation suggested that the legislature in inserting the item referred to in Act 3, merely followed custom and acted inadvertently, is insufficient. By the appropriation of \$36,000 in Act 4, provision was made for the payment of the bailiffs other than that of the Supreme Court specifically provided for in Act 3. Thus construed, the three Acts supplement each other and are consistent.

Passages from the Journal of the House of Representatives for the regular session of 1901, showing that attempts were made by motion to amend the proposed Bailiff Act by striking out Section 5 and by striking out the last two clauses of the title, are referred to by the appellant as indicating that the bill was at that time regarded as including an appropriation. We see no weight in the argument. For aught that appears in the Journal, the motions may have been based on other grounds, as, for example, that it was objectionable to fix the rates of compensation in the Act or to make the procedure as to the issuance of warrants different in any respect from that provided for by the general Audit Act.

Some degree of public inconvenience would doubtless be avoided by the adoption of the construction of Section 5 of Act 10 contended for by the appellant. We cannot, however, give to the Act that construction. In our opinion, no appropriation of money is made by Act 10 and no authority is thereby given to

the Treasurer to pay any of the compensation the rates of which are fixed by Section 5. The warrants in question were correctly drawn upon the appropriation for "Expenses of Supreme and Circuit Courts."

It may be remarked that, as appears from the statement of facts contained in a letter of the Auditor on file herein, the warrants have been paid from this appropriation of \$36,000 "upon vouchers approved by the judges presiding in the several circuits," accompanied by the necessary orders of court. In other words, the Circuit Judges would seem to have placed upon Act 10 the construction now adopted by us.

On behalf of the Auditor, it is contended that, the appeal provided for by Section 16 of Act 39 of the Laws of 1898 being to "the Justices of the Supreme Court," no authority of law exists for filling, as has been done in this case, the vacancies caused by the absence of Chief Justice Frear and Associate Justice Galbraith, that such vacancies may be filled only in causes "pending before the Supreme Court," and that this cause is pending, not before the Supreme Court, but before the Justices thereof. The appellant, on the other hand, contends that the vacancies have been legally filled. The question is one of considerable importance, affecting, as it does, in addition to this class of cases, causes submitted under Act 18 of the Laws of 1898, and deserves careful and elaborate argument. No such argument has been presented. In agreed cases submitted under Act 18 just referred to, the practice has been to appoint substitute justices. Under all of the circumstances, we follow the past practice, and assume jurisdiction.

The ruling appealed from is affirmed.

Appellant in person.

E. P. Dole, Attorney-General, for appellee.

CHARLES A. BROWN v. JOHN D. SPRECKELS and ADOLPH B. SPRECKELS, partners under the name of J. D. SPRECKELS Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING and MRS. JOHN UTTERSTROM.

CHARLES A. BROWN v. J. D. SPRECKELS and ADOLPH B. SPRECKELS, partners under the name of J. D. SPRECKELS Bros., and KUM LEONG, SANG CHUN, MARIA NIAU, AH PING and J. CAMERON.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 13, 1902. DECIDED AUGUST 29, 1902.

FREAR, C.J., PERRY, J., AND L. A. DICKEY, ESQ., OF THE BAR,
IN PLACE OF GALBRAITH, J., DISQUALIFIED.

Parol evidence is inadmissible to vary or contradict the terms of a deed, as, for instance, to show that the survey notes made one distance longer than that described in the deed.

Evidence is inadmissible to show the usual meaning of ordinary words, as, for instance, the broader popular or the narrower legal meaning of the word "beach". The Courts take judicial notice of such meanings.

The beach between high and low water marks could be granted to private persons before the annexation of these islands to the United States.

Even if the law were now different, titles to beach property previously acquired would remain valid.

Crown lands were alienable by the King in 1853.

Accretion belongs to the littoral proprietor.

A description in a deed, first by monuments, one boundary being represented as adjoining or coinciding with the edge or the shore

of the sea; then by courses and distances, which apparently do not go quite to high water mark, and finally by a diagram representing the space between the land as described by courses and distances and the sea as "beach", carried title to high water mark at least.

The words "with the right of extension to low water mark" added to a specific description of certain land near the sea, carry the fee to the land in front of the specifically described land, so far as the grantor has the fee.

As a rule land cannot be appurtenant to land.

In construing a deed, the court will, in order to give effect to the intention of the parties, construe a word in a popular or technical or purely arbitrary sense, provided the intended sense can be ascertained in a legal manner. Ordinarily the ordinary meaning will be given to a word, but that it was used in some other sense may be shown by the context, or by proof that it had a different meaning in the particular trade or locality, or, in case of a latent ambiguity, by parol evidence of the special circumstances of the case.

The word "beach" may be used in a legal sense as meaning the space between high and low water marks or in a popular sense as including more or less land according to the circumstances, above high water mark.

When a deed described certain land by courses and distances and then added, "And also the sea beach in front of the same down to low water mark," and the particularly described land extended nearly to high water mark and the land between was of little value and was used in connection with the rest and no reason appeared for not including it or for granting the beach between high and low water marks alone, and possession of the strip between was taken by the grantee without question, it was error to direct a nonsuit on the ground that the word "beach" had a fixed legal meaning covering the space between high and low water marks alone.

OPINION OF THE COURT BY FREAR, C.J.

These two actions of ejectment were tried together in the Circuit Court and argued together in this Court. They are for accretions on the water front at Hilo, Hawaii. One piece is covered by the second action and two pieces by the first, but only two titles are involved, the two pieces last mentioned being

covered by one title, and the chains of title are in part the same for all three pieces.

Front street runs nearly parallel with and not far from the sea shore at Hilo. Waianuenue and King streets run at right angles to Front street, one block apart, King street being on the Southeasterly or Puna side of Waianuenue street. One title covers the land above Front street between Waianuenue and King streets; the other covers land above Front street, but on the other or Puna side of King street. The question in these actions is whether these titles cover the land, mostly accretion, below Front street, that is, between Front street and the sea, in front of the pieces on the upper side of that street.

The chain of title to the land between Waianuenue and King streets, known as the Bates land, is in part as follows: Deed from King Kamehameha III to Elizabeth G. J. Bates, September 19, 1853; deed from Elizabeth G. J. Bates and Asher B. Bates, her husband, to Benjamin Pitman, July 3, 1858. The chain of title to the other piece, known as the Kalaeloa land, is in part as follows: Land Commission Award 4894, April 18, 1851, to Kalaeloa, followed by Royal Patent 1144, July 7, 1853; deed from Kalaeloa and Hanae, his wife, to Benjamin Pitman, not dated, but acknowledged August 28, and September 18, 1854. The chains of title, thus united, continue as follows: Devise by Benjamin Pitman to Martha B. Pitman, his wife, by will dated March 4, 1880, probated March 27, 1888; deed from Martha B. Pitman to the plaintiff, Charles A. Brown, August 2, 1899.

There seems to be no dispute as to the plaintiff's paper titles. The only question is how much they cover. The defendants offered no evidence, but relied wholly on the weakness of the plaintiff's case, and at the close of the plaintiff's case moved for a nonsuit, which was granted in each case, on the ground that the plaintiff had failed to show that his titles covered the lands in dispute. The plaintiff brings the cases here on three exceptions, two to the refusal to admit offered testimony and

one to the order of nonsuit. The first two exceptions relate to the Bates land only and will be considered first.

The deed from Kamehameha III to Mrs. Bates describes the portion of the Bates land, or most of it, above Front street by courses and distances and monuments, and then adds the following: "And also the sea beach in front of the same down to low water mark." The defendants contended that the word "beach" has a fixed legal meaning, namely, the shore between high and low water marks, and that there was a strip between high water mark and the part described by metes and bounds which did not pass under the deed. The plaintiff contended that the word "beach" was used in its broader popular sense and that it included the strip just mentioned. At the time of the deed from Kamehameha III the sea ran in much farther than it does at present, the land was of little value, the consideration for the 2.756 acres being only \$100, and Front street, perhaps then not known by that or any other name, though it appears to have been known by that name within a year afterwards, was little more than a path or trail. The front line of the portion of the land described by metes and bounds did not coincide with the present upper side of Front street but ran diagonally up from King street to Waianuenue street, striking the latter street about a chain above the present corner of that street and Front street. This is accounted for by the defendants on the theory that the tendency under those early conditions was to go across or cut off corners as much as possible for convenience, and that Front street then slanted up as it approached Waianuenue street and that consequently the description in the deed was made to cover only what was above Front street as it then ran. The plaintiff contended that the description in the deed was intended to extend to the present line of Front street but that by mistake one side, that on Waianuenue street was made too short by one chain, and so he offered to prove that that side was one chain longer in the original survey notes than in the deed. The first exception was to the refusal of the court to permit him to do this.

No error was committed in excluding the survey notes. They were offered merely for the purpose of showing that the length of one side was longer in the survey notes than in the deed, that is, for the purpose of varying or contradicting the deed. Parol evidence is inadmissible for the purpose of varying or contradicting the terms of a deed. The survey notes were not offered for the purpose of explaining a latent ambiguity. We presume they would have been inadmissible even if they had been offered for that purpose, for, although there may be a latent ambiguity in another portion of the deed, there was none in the portion with reference to which the notes were offered. It may be added that there was nothing on the face of the notes to connect them with this deed, and the only testimony relied on was that of a brother of the surveyor, which was very indefinite, and the field notes and deed differ in respect of every course and distance as well as in other important respects.

The second exception was to the refusal of the court to allow the plaintiff to ask a witness, "what is your opinion, as a surveyor, as to what the word beach means in this country?" In view of what we shall say in regard to the next exception and our conclusion thereon, it will not be necessary to say much in regard to this exception. If the intention was to show that the word "beach" is used in this country in the broader popular sense as well as in the narrower legal sense, the testimony was properly excluded, for the reason that evidence is not needed or competent to prove usual meanings of ordinary words. Courts take judicial notice of such meanings. If the intention was to show that the word was used in this country in a peculiar sense different from its ordinary sense, testimony of that general character might perhaps theoretically have been admissible, although in this case there is every reason to believe that the attempt to show that would have been unsuccessful, if it had been allowed, but, even if such testimony were admissible for that purpose, the question asked was perhaps properly disallowed for the reason that there was nothing to indicate that it was, and much to indicate that it was not, offered for that.

purpose, and the question related to the present time only,—not to the time half a century ago when the deeds were executed. A word may have acquired a special meaning here recently, and yet not at that early period in the history of English speaking peoples in these islands.

The third exception was to the order of nonsuit in each case.

This order was based by the trial Judge on the ground that the King or Government could not under the old regime alienate the shore between high and low water marks, and perhaps on the ground also that even if the power to alienate did exist then, the federal law now controls and forbids such alienation. Counsel for defendants, while presenting this ground of inalienability relied on by the Circuit Judge, rely mostly on other grounds to support the order of nonsuit.

There can be no doubt that the power formerly existed here to alienate land between high and low water marks. *King v. O. R. & L. Co.*, 11 Haw. 717; *Territory v. Liliuokalani*, 14 Haw. 88. There can also be no doubt that if such alienation was made in these cases, the fact that these islands have since become annexed to the United States would not affect the private rights previously granted, even if the law as held by the federal courts differed from the law that previously obtained in these islands in this respect. Whether title was granted in these cases to low water mark or not, we need not say. For it was not shown, nor was any attempt made to show, that the defendants were in possession between high and low water mark, and hence no recovery could be had of that strip. Possibly even if it had been shown that they were in possession of that strip, ejectment would lie, if the plaintiff owned to high water mark, even though he did not own to low water mark, considering his special privileges in the shore in front of his land and the defendants' want of an exclusive right of occupancy. The order of nonsuit was clearly erroneous if the plaintiff owned to high-water mark only. Most of the land sued for and all that was sought to be recovered at the trial is above high-water mark.

The Bates land, covered by the deed from the King, was

part of the Crown lands. But at that time the Crown lands were alienable by the King. *Estate of Kamehameha IV*, 2 Haw. 715.

If the plaintiff's predecessors in title owned to high water mark, the plaintiff now owns to high water mark although that is now, owing to accretion, much farther out than it was formerly. *Halstead v. Gay*, 7 Haw. 587.

What then do the titles cover? The Kalaeloa piece will be considered first. The description is substantially the same in both the Award and the Patent. It is in Hawaiian and may be translated thus: "Beginning at the West corner of this, adjoining the edge of the street (King Street) along the edge of the sea adjoining the land of Awaawa and stone wall and Hanamaikai, and running." Then follow courses and distances and area. Thus there are two descriptions. One is by monuments, that is, King street on one side, the sea in front, the land of Awaawa and stone wall on the other side and the land of Hanamaikai in the rear. The other description is simply by courses and distances. There is no dispute as to what each of these descriptions means. The two descriptions were evidently meant to correspond or harmonize. The description by monuments would take the land to the sea, that is, at least to high water mark. There is also a diagram on both Award and Patent, representing the land by heavy lines, leaving a space between the front line and the sea, inclosed at the ends with dotted lines, extensions of the two side lines, and with the word "beach" in this space. The names of the other monuments also appear on the diagram in their proper places. If the word "beach" on the diagram was used in its narrower sense as meaning the space between high and low water marks, the meaning contended for by defendants themselves, it is evident that the lower or front boundary as described was intended to be at least down to high water mark. The natural monument along the entire front boundary is given as the edge or shore of the sea. This of course would control courses, distances and area, in the absence of a clearly indicated intention to the contrary. The

description of this boundary is "*ma kapa o ke kai*," that is, "along the edge of the sea," similar to that of the first side, which is, "*pili ma kapa o ke ala*," that is, "adjoining the edge of the street." It is true, the boundaries of the other sides are described as, "*pili ana me*" instead of "*pili ma*," but we do not see how a distinction material for the purposes of this case can be made in the meaning. The expression is the same for the sea and the street, and the diagram and description both show that the land runs to the street. The fact probably was that the description or survey by courses and distances was for convenience made of the land above what was popularly considered the beach, without any particular reference to where ordinary high water mark was; that the description by monuments showed what was actually intended to be covered, and that the diagram was an attempt to represent both these modes of description at the same time. It seems clear on the whole that the land was intended to go at least to high water mark.

Two other questions are raised in regard to the Kalaeloa land. One is that whatever the Award and Patent passed to Kalaeloa, the deed from him to Pitman did not carry the part below the upper side of Front street. The description is first of a portion of the Kalaeloa land by monuments, courses and distances. It begins at the corner of King and Front streets and runs along Front street to a certain point and then up and around to the point of beginning, and then adds, "with the right of extension to low water mark saving and excepting the necessary width of road way." The road way excepted was Front street. It is contended that the grant of the "right of extension to low water mark" was a grant at most of an easement. The word "extension" would seem to imply that the right granted in this clause was of the same kind as that granted in the previous clause, that is, a fee simple. The exception of "the necessary width of roadway" also tends to show that something more than an easement was intended to be granted. There is nothing to indicate that Kalaeloa claimed or supposed he had any particular easement in the lower land. He had the fee, and, having the fee, he

no doubt intended to grant it. The clause should be construed, if possible, as having some meaning, or so as to be given effect. There is no easement that can be assigned to it. It must have meant the fee, as the word "extension" indicates. It is true a better way of drawing the deed might easily be suggested, but that is true of most documents that become subjects of litigation. A clause is not to be rejected merely on the theory that if it was intended to have a particular meaning it might better have been expressed in some other way. The method of expression employed was very likely due to the peculiar method of description in the Award and Patent and the special features of the land. In *Dillingham v. Roberts*, 75 Me. 469, the words "including all the privilege of the shore to low water mark," added to a specific description to high water mark, was held to carry the fee to low water mark.

It is further contended in regard to the Kalaeloa land that the rights of Pitman, if he had any, in the land below Front street under his deed from Kalaeloa, did not pass to the plaintiff, for the reason that they had already passed from Pitman under a previous deed made in 1861 by him to one Thomas Spencer. This deed to Spencer covered several pieces of land, one of which was a portion of the Kalaeloa land other than the portion claimed by the plaintiff. The only words in that deed under which it is contended that the land below Front street passed to Spencer are "with the appurtenances thereof" in the habendum clause. As a rule land cannot be appurtenant to land. This rule may have some exceptions, but even if the present case could be one of them, the evidence was clearly not sufficient to show that the lower land was so used in connection with the portion of the upper land conveyed to Spencer as to require the court to hold as matter of law that it passed as a mere appurtenance of it.

Turning now to the Bates land, the question is one of greater difficulty. In the deed from the King this land is described by courses and distances and, except the front line, by monuments. Then follow these words: "And also the sea beach in front of

the same down to low water mark." The defendants contend that the word "beach" was used here in its narrower legal sense as meaning the area between high and low water marks, and that parol evidence is inadmissible to show that it was used in a broader popular sense as including more or less land above high water mark according to the circumstances. They contend that the intention was to convey two distinct pieces of land, with a strip between remaining in the grantor, there being a strip between high water mark and the front line of the part more specifically described in the deed.

A word may be used in a deed in almost any sense, and if it appears in a proper way that the intention was to use a word in any particular sense, whether a technical sense or a popular sense or a sense in which the word is not used at all by others, the court will give it the intended meaning. It is immaterial whether the parties used it in a wrong sense by mistake or consent. If the intention can be ascertained in a legal manner, it will be given effect. Of course the expressed intention cannot be controlled by proof of a different actual intention. Ordinarily a word is given its ordinary meaning. But if the deed itself shows it to have been used in some other sense, it will be so construed. If the deed does not show that, still it may be shown by parol evidence that the word was used in a particular sense in a particular trade or locality, in which case the court will so construe it, on the presumption that the parties under the circumstances used the word in that sense. And in the absence of any showing of a special sense by the deed or by special custom or usage, parol evidence is admissible to explain the meaning if there is a latent ambiguity.

Now, the word "beach" undoubtedly is used in a broader popular sense as well as in a narrower legal sense. Every one knows this. The former use is probably the more common of the two in ordinary speech. Defendants contend that the word "beach" is synonymous with "shore," and yet in *Mather v. Chapman*, 40 Conn. 382, under a deed of certain land reserving the privilege of piling up sea-manure "on the shore," the

court held that the shore was the upland above high water mark. The defendants had argued in that case, much as the defendants argue here, that the word "shore" had a definite and inflexible meaning in law, denoting the space between high and low water marks, and cited the same authorities to a large extent.

There is nothing to prevent the parties using the word in its more popular sense if they so desire. Naturally the courts construe it in its narrower legal sense. The cases in which such construction is given are mostly cases in which the beach is designated as a boundary. In such cases, of course, as, for instance, when land or a boundary is described as running to or along the beach, the narrower meaning has to be followed generally for certainty. Otherwise it would in many cases be impossible to say where the inner line of the beach was. But when, as in this case, there is a grant of the beach itself in addition to a grant of land above the beach, or, as in the Connecticut case just cited, there is granted or reserved a right to do something on the beach, there is not the same necessity for a strict construction.

In the present case there are indications in the deed itself that the broader meaning was intended. Other land was granted and the beach "in front of the same." This expression, like the word beach, is used in two senses. It might mean anywhere in front, even though there were a strip between, but presumably it means immediately in front, that is, adjoining. In other words, the phrase "in front of" tends to show that the word "beach" was intended to cover all up to the particularly described land. The words "down to low water mark" point in the same direction. They seem to indicate that the word "beach" was not used in a strictly legal sense as necessarily in itself covering just the area between high and low water marks, no more and no less.

The natural construction, looking at the deed alone, would be that the particularly described land extended to high water mark and that the additional clause carried the grant down to low water mark. There is no patent ambiguity. But when an

attempt is made to apply the description to the land, a latent ambiguity appears. There is found a strip between high water mark and the lower particularly described boundary. This, especially in connection with the phrases "in front of the same" and "down to low water mark," gives rise to the question whether the word "beach" was not used in its broader sense. This question arising by evidence *aliunde* may be determined by evidence *aliunde*.

The grantor owned the whole strip and under the same title as the part particularly described. The area between that part and high water mark was not very extensive and was of little value and was closely connected with the upper part in use. There was no apparent reason why the whole should not be conveyed. There was apparently much reason why it should be. It does not seem natural that the space between high and low water mark alone should be conveyed leaving the strip between in the grantor. For what purpose would that space alone be granted? The fact that there was a roadway in front of the upper part may account for the separate description of the two parts. The lower boundary of the upper part, according to the defendants' own contention, was intended to run along the roadway as it was at that time. Then, again, there was testimony tending to show that this broader construction was placed upon the deed by the parties at the time, as shown by their acts. There was testimony, for instance, tending to show that possession was taken and held in accordance with that construction without question. There was more or less testimony as to just where high water mark was at the time of the deed from the King, but it will hardly be necessary to go into that at length now. Apparently at that time there was an earth bank against which the sea washed, which was in places above the present lower side of Front street, and sometimes in very stormy weather the sea washed over it in places.

From what has been said, it is clear not only that the word "beach" might have been used in its broader sense, but that

there is much reason to believe that it was used in that sense, and that the trial Judge erred in directing a nonsuit.

The exception to the order of nonsuit is sustained and a new trial is ordered in each case.

J. A. Magoon, T. I. Dillon, Holmes & Stanley, and Smith & Parsons for the plaintiff.

Kinney, Ballou & McClanahan for the defendants.

MAKAIO v. ADAMU and ALBERT HORNER.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 6, 1902. DECIDED OCTOBER 14, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A notice of "intention to appeal" is not a notice of appeal within the meaning of Section 1, Act 40, Laws of 1898.

OPINION OF THE COURT BY PERRY, J.

This is a suit in equity for the foreclosure of a mortgage. A decree dismissing the bill was filed on May 9, 1902. On May 14, 1902, a paper reading, under the title of the court and cause, as follows, was filed by the attorneys for the complainant:

"Notice of Appeal.

"Now comes Makaio, petitioner in the above entitled cause, through his attorneys, Andrews, Peters & Andrade, and hereby gives notice of his intention to appeal this cause from the decree of the Honorable Judge Robinson, dated the 8th day of May, 1902." On the day following, another instrument was filed for the defendant entitled, "Appeal," and reading: "Now comes Makaio, petitioner in the above entitled cause, through his attor-

neys, Andrews, Peters & Andrade, and hereby appeals this cause to the Supreme Court of the Territory of Hawaii from the decree of the Honorable Judge Robinson dated the 8th day of May, 1902."

The instrument last recited cannot, it is clear, operate as an appeal because it was not filed within the time prescribed by law, and, for the same reason, it cannot be regarded as an amendment of the first instrument. Is the paper filed on the 14th a sufficient notice of appeal within the meaning of the statute? We think that it is not. The statute on the subject (Section 1 of Act 40 of the Laws of 1898) says that "Appeals shall be allowed from all * * * decrees of Circuit Judges in Chambers, to the Supreme Court, * * * whenever the party appealing shall file notice of his appeal within five days" after the filing of the decree appealed from, and upon complying with certain other requisites. The statute contemplates the giving of notice that an appeal has been taken or, at least, that it is being taken concurrently with the giving of the notice. It is - not sufficient to notify the opponent that the party *will* appeal or *intends* to appeal. A notice of intention to appeal is not a notice of appeal. See *Simpson v. Ogg*, 1 Pac. (Nev.) 827 and *Parker v. Denny*, 7 Pac. (Wash.) 892. The notice under consideration is defective in other respects but whether fatally so we need not say.

The motion to dismiss the appeal is granted.

L. Andrews and *F. Andrade* for complainant.

Kinney, Ballou & McClanahan and *S. H. Derby* for respondent *A. Horner*.

IN THE MATTER OF THE GUARDIANSHIP OF
REBECCA PANEE HUMEKU, a Spendthrift.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JULY 28, 1902.

DECIDED OCTOBER 16, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

After an adjudication by a court of competent jurisdiction that a person is a spendthrift within the meaning of the law and the appointment of a guardian, the presumption is that the necessity for the guardianship continues until the contrary is shown.

Upon the evidence in the present case, held, that this presumption has not been rebutted.

OPINION OF THE COURT BY PERRY, J.

On April 14, 1893, Rebecca Panee Humeku was adjudged a spendthrift by a Circuit Judge sitting in Probate and J. A. Magoon was appointed guardian of her person and estate. Mr. Magoon has ever since that date acted as such guardian. On September 3, 1901, the ward filed an application for a termination of the guardianship and discharge of the guardian, the main averments being that she was not, at the time of the adjudication just referred to, and has never been a drunkard either within the meaning of Section 1965 of the Civil Laws, under which the Probate Court acted, or at all, and that she "is now and ever has been sober and sensible and competent to manage her own estate and expend prudently the income thereof and that she needs no guardian of her property or her person." The application, in other words, seems to be based upon two grounds, (a) that the adjudication should not have been made and (b) that the guardianship, even if originally necessary, is no longer necessary. The application does not, however, pray for an or-

der setting aside the original adjudication unless such prayer is to be regarded as included in that for general relief. After hearing, the Circuit Judge granted a decree terminating the guardianship. From that decree the present appeal is brought by the guardian.

If the ward intended by her application to ask for an order setting aside the original adjudication, such prayer, made eight years after the order attacked, comes, at least, with but little force. The objections urged by counsel to the order of April, 1893, are, we think, not well founded. It was competent for the ward, who was of age and not insane, to waive, as she did, service of summons and the fourteen days notice provided for by Section 1966 of the Civil Laws, to join in the petition for the appointment of Magoon, and to consent to an immediate hearing. The Probate Court had jurisdiction. The petition was not verified or filed after the hearing, as claimed by counsel. As we read the record, such verification and filing took place on the thirteenth, while the hearing was had and adjudication made on the fourteenth, of April, 1893. The averment that Rebecca "through excessive drinking and idleness is spending, wasting and lessening her estate so that she will thereby expose herself to want and destitution and suffering", follows the language of Section 1965 and is a sufficient statement of the "facts and circumstances of the case" within the meaning of that section, and, if found to be true, sufficient to authorize an order of guardianship.

Counsel also claims that the evidence adduced at the original hearing was insufficient to support the adjudication made. Upon the practical consent to and joinder in the petition endorsed thereon by Mrs. Humeku, the Probate Court might, perhaps, without other evidence, have properly made the order. However that may be, we need only add, in the language used in the case entitled "*In re Guardianship of Kalua Kapukini, a Spendthrift*," 12 Haw. 22, 25: "A full hearing was had, the spendthrift * * * was present, * * * and the Circuit Judge in probate had full jurisdiction; evidence was then

taken but the reported evidence was meagre. The adjudication * * * as a spendthrift was by a court of competent jurisdiction after hearing, and it is not now open to the petitioner to have a re-opening and review of the proceedings and evidence had on the petition for the guardianship."

The contention that the petitioner was not a spendthrift at the date of the former decree, is not, it may be added, now available to the ward. It was abandoned by her at the hearing below. During a discussion, before the Circuit Judge, as to the admissibility of certain evidence offered by the guardian on the subject of whether or not the ward was in fact a spendthrift within the meaning of the law in April, 1893, her counsel said: "I think upon reflection I will take the responsibility of limiting my application to the proposition, I will take two years for safety, that she has been sober and sensible and competent to administer her own affairs. Counsel for petitioner admits that this application for discharge of the guardian and termination of the spendthrift trust is upon the fact that for two years last past the petitioner has not been a drunkard or a debauchee and has been and is competent to administer her own estate, to take charge of her own estate and any necessity which might have existed for the creation of this spendthrift trust originally has for two years last past ceased to exist and the continuance of the trust is no longer necessary." That admission or abandonment of position was relied upon and acted upon by the guardian in the conduct of his portion of the case at the trial and cannot now be withdrawn or disregarded by the ward.

Section 1975 of the Civil Laws provides that "the guardian of any * * * spendthrift may be discharged by any Judge of Probate, when it shall appear to him, on the application of the ward or otherwise, that such guardianship is no longer necessary." The applicant claims that under this provision she is now entitled to a termination of the guardianship.

The present petitioner having been adjudged, in 1893, a spendthrift within the meaning of the law, "the presumption is," as held by this Court in the case of *Kalua Kapukini, supra*,

"that the necessity for the guardianship continues until the contrary is shown, and the burden of proving that there is no reason now for its continuation is on the ward." The ward in this case has not shown that the guardianship is no longer necessary. On the contrary, the evidence before us clearly shows that she had not prior to the filing of this application reformed as to her habits of drinking and that she was until then addicted to the excessive use of intoxicating liquors. It appears that in 1898 she underwent a certain treatment, known as the Hagey Gold Cure, intended to cause the desire for alcoholic liquors to cease, and that for a period of about one year she abstained from the use of such liquors. Thereafter, however, as clearly shown by the evidence, she relapsed into her former habits and drank excessively. Upon the evidence, we are satisfied, further, that by reason of excessive drinking the applicant would, if the guardianship were terminated, so spend, waste and lessen her estate as to expose herself to want and suffering. The continuance of the guardianship is necessary.

After the rendition of the decree appealed from, the ward signed an instrument purporting to be a conveyance and assignment of the greater portion of her property to a domestic corporation in trust to pay to her the net income for life and at her death to convey and assign the property to such person or persons as the grantor may designate by will, or, if she shall die intestate, to certain named persons. Whether or not the execution of this instrument could under the circumstances operate as a valid conveyance or assignment as intended, we need not now decide. Let it be assumed that it does so operate. For the ward it is contended that this disposition of her property in itself shows that the guardianship is no longer necessary, within the meaning of the statute, because the ward has thereby fully protected herself from want for the remainder of her life and placed the property beyond the power of herself or any one else to squander. We cannot so hold. If, as contended by the guardian, the deed and the trust thereby created are revocable at the will of the grantor, the ward, of course, is not in any

sense protected from her own improvidence. If, on the other hand, the deed and the trust are, as claimed for the ward, irrevocable, still no protection is afforded. The principal of the property, under this view, has already been given away by the ward beyond recall, and nothing remains to her but the income; and if the guardianship is terminated and the ward left free to act as she pleases, there would be no reason in law to prevent her from absolutely selling the income also, in whole or in part, or, what is the same thing, her right to receive it.

If the condition of the ward's property and the income thereof are such as to warrant or require as a matter of justice the allowance to her or for her use of a larger sum at stated periods than she has hitherto received from the guardian, or if the guardian has been in any way remiss in the performance of his duty, those are matters which may be adjusted or remedied by the Circuit Judge in Probate upon proper application.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for the entry of a decree denying the present application and for such further proceedings as may be proper.

Thomas Fitch for the ward.

J. A. Magoon, guardian, in person.

CONCURRING OPINION OF GALBRAITH, J.

While I do not view this statute authorizing the appointment of a guardian for a spendthrift, with any degree of pride, I am not prepared to state that it does not answer a necessity and perform a useful purpose in this Territory.

A number of inferences may be made from the record in this case among which may be enumerated the following, to wit, (1) that the ward is a person without business capacity or a proper sense of the value of money or property; (2) that she has a well developed taste for strong drink and a disposition to gratify it on slight provocation; (3) that she is a spendthrift within the terms of the statute; (4) that there are a number of persons who are willing to assist her in the management and dissipation

of her estate; (5) that the estate has been prudently managed by the guardian and no satisfactory reason given for the termination of the guardianship; (6) that the interest of the ward and her estate demand that the guardianship should continue under the protection of the probate court; (7) that while the ward has not been provided with a house in keeping with the value of her estate this necessity can be as well met under the guardianship as by its termination. For these reasons I concur in the conclusion and judgment announced in the foregoing opinion.

THOMAS MILNER HARRISON *v.* J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, DOROTHEA EMERSON (nee Lamb), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEO. D. MOORE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 9, 1902.

DECIDED OCTOBER 22, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A partner may represent and bind the partnership and its other members in matters within the scope of the partnership business.

A partnership was formed for the purpose of engaging "in the business of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas." The articles also contained clauses prohibiting any of the partners from creating any liability

on behalf of the company, providing for the contribution by the partners to a fund for the establishment and maintenance of institutes, and reciting that the members would not be bound for any debts and obligations incurred otherwise. Held, that, assuming that it was within the power of a partner to sell or dispose of the right to establish and conduct institutes in certain portions of the field owned by the partnership, nevertheless no partner as such had authority, in making such a sale, to bind the other partners by a contract to guarantee to the extent of £2000 satisfaction with the Hagey business and thus create a liability to pay that amount in case of dissatisfaction.

A partner has no authority as such to form a new partnership to include within its membership the original partnership or its members.

A power of attorney authorized the agent to act for the principal "in all matters connected with the A. P. & I. H. Co. and for that purpose to establish institutes and to sell the medicines compounded under the formulas belonging to the company; to sell and dispose of the said formulas in the district where he may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecution of the business of the said company". Held, that no authority was by this instrument granted to the agent to form a new partnership including within its membership the original association or its members.

General words in a power of attorney must be construed with reference to the specified objects to be accomplished.

Where a principal accepts the benefits of an unauthorized act of an agent with knowledge, actual or constructive, of all the material facts, he is deemed to have ratified the act and is bound thereby; but if the acceptance be in ignorance or under misapprehension of any of the essential circumstances relating to the transaction, this will absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent.

A cancellation of one agreement is a good consideration for the execution of another.

It is a sufficient consideration for an agreement that the party claiming a benefit thereunder caused to be executed a release of an encumbrance standing against the property of the other party.

OPINION OF THE COURT BY PERRY, J.

On April 10, 1897, the parties named as defendants in this action, excepting only J. Wolfenden, associated themselves as co-partners under the firm name of The African, Pacific and Indian Hagey Company, "in the business", as recited in the articles, "of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas." Other material portions of the agreement are here inserted:

"The territory through which the operations of this Company will extend are the Islands of the Pacific and Indian Oceans, and the Continent of Africa, exclusive of the Hawaiian Islands.

* * *

"The capital stock of this co-partnership shall consist of One Hundred and five thousand (105,000) dollars to be owned in the following proportions: T. E. Cowart 31740 dollars, J. H. Kirkpatrick 31740 dollars, A. E. Powter 11458 dollars, Geo. D. Moore 2062 dollars, J. A. Magoon 12500 dollars, F. B. McStocker 5000 dollars, L. C. Ables 8000 dollars, Dorothea Lamb 2500 dollars. * * *

"That T. E. Cowart, J. H. Kirkpatrick and L. C. Ables, shall at all times during the continuance of this partnership give their attendance and to the best of their skill and power exert themselves for the joint interest, profit and benefit of the partnership, and for such services they shall receive a salary of two hundred (200) dollars per month for each and every month as long as the said business is profitable, to be paid out of the proceeds of the business after the running expenses have been deducted. It is understood and agreed that there shall be no personal liability of any of the partners for the payment of these salaries.

"That all net profits shall be divided between the partners in proportion to the amount of capital stock of each, and that said co-partners shall bear and sustain all expenses and losses in accordance with the proportional share that each may hold.

* * *

"That the said partners mutually agree to and with each other that during the continuance of the said partnership, none of them will give or endorse any note, or create any liability on behalf of the company.

"It is hereby expressly agreed and understood by the parties

to this agreement that a fund necessary for the establishment and maintenance of the Institutes in the territory before referred to, shall be placed in the hands of the said T. E. Cowart, J. H. Kirkpatrick, and L. C. Ables, and that the members of this Company are not bound for any debts and obligations incurred otherwise. * * *

"The interest of the partners is to be pooled, that is, no one partner can dispose of his interest or any part thereof without the consent of all the other partners thereto obtained in writing."

The powers of attorney were executed on the same day, one by J. A. Magoon and Dorothea Lamb to T. E. Cowart and J. H. Kirkpatrick and the other by McStocker to Ables, the two being, as to grant of powers, the same in form. That signed by McStocker read in part as follows: "I * * * do hereby make, constitute and appoint L. C. Ables * * * my true and lawful attorney in my name, place and stead to act for me in all matters connected with the African, Pacific and Indian Hagey Company and for that purpose to establish Institutes and to sell the medicines compounded under the formulas belonging to the company; to sell and dispose of the said formulas in the district where he may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecution of the business of the said company."

Cowart, Kirkpatrick and Ables proceeded to New Zealand and Australia. On October 1, 1897, the contract with Harrison and Gilmore now sued on and which is reported at length in the opinion filed on demurrer in this case (see 13 Haw. 339), was executed. Thereafter Harrison and Gilmore went to Tasmania for the purpose of establishing an institute and after remaining there some time the former gave notice that he was dissatisfied with the condition of the business and later brought this action. The case comes now to this court on 160 exceptions noted during the proceedings in the trial court.

One of the questions presented is whether or not Cowart, Kirkpatrick and Ables had authority to execute, as they purported to do, on behalf of Magoon, Mrs. Emerson and McStocker, the contract sued on, either as partners in the A. P.

& I. H. Co. or as attorneys-in-fact under the powers of attorney above quoted. At this point it may be observed that at the trial undisputed evidence showed that Harrison had, before entering into the agreement, full knowledge of the provisions of the original articles of association of the A. P. & I. H. Co. and of the powers of attorney and that he therefore dealt with the partners and agents at his risk and is bound by such limitations as are set forth in those instruments.

First, as to the articles of association. In acting under these alone, the partners in Australia would have the right, ordinarily possessed by partners, to represent and bind the partnership and its absent members in matters within the scope of the partnership business. A part of the business was stated by the agreement to be the "establishment and disposition of Institutes" for the purpose of administering the formulas. This might perhaps include within it the power to sell or dispose of the right to establish and conduct institutes in certain portions of the field owned by the company,—the right, as it has been termed in argument, to sell territory. In view, however, of the other and specific terms of the articles prohibiting any of the partners from creating any liability on behalf of the company, providing for a fund for the establishment and maintenance of the institutes and reciting that the members would not be bound for any debts and obligations incurred otherwise, we are of the opinion that no partner as such had authority to bind the other partners by a contract to guarantee to the extent of 2000£ satisfaction with the Hagey business and thus create a liability to pay that amount in case of dissatisfaction. Moreover, the transaction with Harrison and Gilmore was in reality the attempted creation of a new partnership intended to include within its membership the A. P. & I. H. Co. or its members individually. Neither under the general law concerning partnerships nor under the provisions of this contract could a partner enter into such a transaction and bind absent partners thereby.

Counsel for the plaintiff contends that the provision that "said co-partners shall bear and sustain all expenses and losses

in accordance with the proportional share" (of the capital stock) "that each may hold", contradicts and renders meaningless the clause "that the members of this company are not bound for any debts and obligations incurred otherwise." We do not think so. The two can be construed consistently with each other. It was provided in the agreement that a fund necessary for the institutes should be placed in the hands of the partners who were to have the actual and active management of the business. The clause as to expenses and losses supplemented this by indicating in what proportions the fund was to be made up and by declaring that in the event of a loss, total or partial, the members should suffer in the same proportions. It was entirely consistent with this to provide that beyond this the managers should not look to the absent members, as also that they should not give or endorse any note or create any liability on behalf of the company. In the matter of the salaries of the managers the provision was the same. Those officers, it was agreed must look to the profits of the business, and not to the members, for their compensation. Throughout the instrument the intent is clearly apparent to confine expenditures to the sum contributed by the members and to the profits of the business, and to fully protect the partners from any other outlay or liability.

The powers of attorney granted, in our opinion, little, if any, power not already possessed by the agents as partners. The agents as partners had authority to "establish institutes", "to sell the medicines compounded under the formulas belonging to the company" and "to sell and dispose of the said formulas in the district" where they might be operating. These are the only powers *specifically* named. Assuming that, as seems to be held by some authorities, the power to sell includes the power to sell on approval and, consequently, in this case, the power to guarantee satisfaction, still no authority was conferred by the letters of attorney to form a new partnership with either the A. P. & I. H. Co. or its members as partners therein, and that, as already stated, is what was done in the contract under consideration. In the letters, immediately following the specific grants

already referred to, is this: "and to do and perform all other acts and things that may be necessary and proper *in the prosecution of the business of the said company*". To make the original partnership a partner or its members partners in a new partnership with others is not an act "in the prosecution of the business of the company." As to the general words in the instruments, they "must be construed with reference to the specified objects to be accomplished". *Born v. Simmons*, 36 S. E. 956. See also *Luke v. Grigg*, 30 N. W. 170; *Cambell v. Association*, 163 Pa. St. 609. In our opinion, the contract sued on was unauthorized either by the articles of association of the A. P. & I. H. Co. or by the powers of attorney and consequently was not binding on Magoon, McStocker or Mrs. Emerson unless ratified.

Instructions in conformity with this view of the law were requested by the defendants and refused by the court. The charge of the court was evidently based on the theory that the execution of the contract sued on may have been within the scope of the business of the A. P. & I. H. Co. and that, if it was, it was authorized by the articles of association and by the powers of attorney and all the defendants would be bound thereby. Giving some definitions on the subject of "the scope of the partnership business", and also instructions as to the ordinary powers of partners, the presiding judge submitted to the jury the question of whether or not the execution of the contract was within such scope and therefore authorized. The verdict was for the plaintiff against all of the defendants. Whether the jury found that the contract was authorized by the articles or by the powers of attorney, or that it was not so authorized originally but was subsequently ratified, it is impossible for us to say; it may have been the former. The error was prejudicial.

The rule is well settled that where a principal accepts the benefits of an unauthorized act of an agent with knowledge, actual or constructive, of all the material facts, he is deemed to have ratified the act and is bound thereby; but if the acceptance be in ignorance or under misapprehension of any of the essential circumstances relating to the transaction, this will

absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent.

Several exceptions were noted to the exclusion of certain letters offered in evidence by the defendants, which letters it is claimed would tend to show diligent inquiry and repudiation by some of the defendants of the acts of Cowart, Kirkpatrick and Ables. As to the correctness of these rulings no opinion need be expressed, for the questions may not arise on a new trial, or, if they do, they may arise under different circumstances. So, also, as to the sufficiency of the evidence adduced to support a finding of ratification and as to the correctness of the instructions given on the subject of ratification and, thereunder, of actual and of constructive knowledge. The evidence, the finding of the jury, and the instructions may each or all be different at the new trial.

If demand and tender before commencing the action were necessary, these were sufficiently shown. There was evidence tending to prove that at the time notice of dissatisfaction was given demand was made by Harrison upon Kirkpatrick to the effect that Harrison "wanted according to the contract, stock of the market value of 2000£" and that the partner named asked Harrison to write him a letter stating his best terms of settlement. Such a demand, we held on demurrer, was in effect "a demand accompanied by an offer to give in exchange his" (Harrison's) "intangible interest" in the Tasmania partnership. So far as an offer or tender of his intangible interest is concerned, the plaintiff, if he made the demand in those terms, did all that by the terms of the contract he was required to do in order to become entitled to the relief demanded. 13 Haw. 349.

Notice to and demand upon Kirkpatrick was sufficient notice to and demand upon all of the other members of the A. P. & I. H. Co., provided they all executed or subsequently ratified the Tasmania agreement. The promise contained in paragraph 4 sued on, was that "the company" would deliver the stock. The parties jointly and severally undertook that they as

partners of the company would do this. If, then, they can be held jointly, notice to one would be notice to all.

The fact, if fact it was, that prior to leaving for Tasmania Harrison was dissatisfied with the instructions given him as to the conduct of an institute, while it was evidence from which the jury might infer or find a lack of *bona fide* dissatisfaction with the condition of the partnership business in Tasmania, would not *necessarily* show bad faith. Harrison might have been dissatisfied with the instructions and yet be *bona fide* dissatisfied, after due trial, with the condition of the business. So, too, it was not improper for plaintiff to seek the advice of counsel as to his rights in the premises. If in consequence of such advice he proceeded to Tasmania to make an attempt to establish the business, that would not prevent his recovering provided always that the attempt and his subsequent dissatisfaction were both in good faith. The question was one to be determined by the jury upon all of the evidence adduced.

Two agreements, covering the same subject-matter but differing in some respects from that sued on, were signed before that of October 1st was executed. It is claimed that that of October 1st was without consideration. As to this we simply observe that the cancellation of one agreement may be good consideration for the execution of another, and also that if, as testified to by plaintiff, the consideration given by him for the second agreement was the sale and assignment of certain leases and sheep, subject to an outstanding encumbrance, and if, in order to obtain the third agreement, he caused the encumbrance to be cancelled or released, that would be sufficient consideration for the third agreement.

The remaining questions raised by the exceptions are such as may not arise upon a new trial.

The verdict is set aside and a new trial is ordered.

Robertson & Wilder for plaintiff.

Kinney, Ballou & McClanahan, J. A. Magoon and J. Lightfoot for defendants.

B. L. JONES v. J. K. PETERSEN.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED OCTOBER 6, 1902.

DECIDED OCTOBER 25, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Equity will not compel nugatory acts, as, for instance, the specific performance of a contract to convey when the vendor has no title, although it may compel performance in part, when possible, and give compensation for the deficiency.

Quere, whether equity should compel performance of a contract to assign a lease, if the lessor refuses to consent to the assignment and the lease by its terms is not assignable without such consent, but, *semble*, the burden of showing such refusal is upon the defendant.

But a lessee's contract to "sell and relinquish all claims and deeds" to the land is not a contract to make a valid assignment or to obtain the lessor's consent, but is a contract to release or convey the lessee's right, title and interest, and may be enforced, the assignee taking his chances upon obtaining the lessor's consent.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a decree in equity ordering the defendant to specifically perform a contract, the memorandum of which in writing signed by the party to be charged is as follows:

"Hilo Hawaii, H. I., March 13, 1899.

"This is a receipt to prove that I, J. K. Petersen, sell and relinquish all claims and deeds to lots 261 and 278 in the District of Olaa, Island of Hawaii, to B. L. Jones for the sum of \$500.00 five hundred dollars, and which I receive \$50.00 cash to bind the sale, and \$450.00 four hundred and fifty dollars the balance of purchase price when the deeds are transferred to the said B. L. Jones.

(sig.)

"J. K. Petersen."

The defenses of fraud, inadequacy of consideration and indefiniteness in the form of the contract are abandoned, and the only defense now relied on is that the defendant has not and never had the ability to perform and consequently that a decree of performance would be nugatory.

The defendant's title to the land is that of a lessee under a right of purchase lease, dated April 1, 1898, for twenty-one years from the government, with the right to obtain a patent in fee at any time after three years provided he has made certain improvements and performed the conditions of the lease. See Civ. L., Secs. 239-248. One of the conditions of the lease is that the lessee "shall not assign his said interest under the said lease or any part thereof without the written consent of the Commissioner of Public Lands (*Id.* Sec. 245), and "the violation of any of the foregoing conditions shall be sufficient cause for the Commissioner, with the approval of the Governor, to take possession of the demised premises without notice, demand or previous entry, and with or without legal process and thereby determine the estate created by such lease" (*Id.* Sec. 246), but the lessee may surrender his lease at any time if he has performed its conditions up to that time. *Id.* Sec. 245. The lessee has not yet obtained a patent for the land.

The Circuit Judge seems to have decreed specific performance on the supposition that under the decision in *Fishel v. Turner*, 13 Haw. 392, valid assignments of such leases could be made and agreements therefor enforced irrespective of the statutory requirement of the Commissioner's consent thereto, but obviously that was an unwarranted supposition. In that case the agreement was not to assign the lease but to convey the land when the patent was obtained, and the suit was not brought until after the patent was obtained. But should not the decree be sustained on other grounds?

The defendant's contention is that he cannot make a valid assignment without the consent of the Commissioner, and that since, so far as appears, such consent has not been given, an

attempted assignment would be inoperative, and that equity does not compel nugatory acts.

It is true equity will not as a rule compel a conveyance by one who has no title at all, but in general when a vendor has title to a portion but not to the whole of the subject matter, although he cannot compel performance by the purchaser, yet the latter may compel performance by him so far as possible; and have compensation for the deficiency. Fry, Sp. Per., Secs. 1223 *et seq.* And sometimes the vendor is compelled to endeavor to obtain a good title if he has contracted to convey one. See *Welborn v. Sechrist*, 88 N. C. 287. Whether these principles would apply in this case so as to justify an enforcement of specific performance if the contract were to make a good assignment of the lease and the estate thereby created, we need not say. But we may remark in passing that it does not appear that the consent of the Commissioner cannot be obtained or that any attempt has been made by the defendant to obtain it. It looks very much as if he did not want to obtain it. It would seem that the burden would be on him to show that he could not obtain it. *Borden v. Curtis*, 46 N. J. Eq. 468. Plaintiff's counsel say in their brief that the Commissioner has informed them that he consents to such assignments almost as a matter of course and would consent to this assignment upon proper application, but there is no evidence on this point.

As we construe it, the contract was not to make a good assignment of the lease and the term but to give up to the plaintiff all the defendant's interest therein or rather claim thereto. The words are, "sell and relinquish all claims and deeds" to the lots in question. This was not an undertaking to obtain the consent of the Commissioner or to pass a good title. It was rather in the nature of an agreement to release and quitclaim. In such cases even the purchaser cannot set up defectiveness of title. Fry, Sp. Per., Secs. 857, 1287. Much less should the vendor be permitted to set up deficiencies in his own title. In this case, the circumstances were all known to both parties. They knew what they were doing. Whether this was the con-

struction placed upon the contract by the plaintiff and the Judge below is perhaps not altogether clear. The prayer of the bill in this respect was that the "defendant be directed and required to make, execute and deliver to plaintiff a good and sufficient deed or assignment of his interest in said land", &c., and for other relief, &c., and the decree was that the defendant "execute and deliver to the plaintiff, B. L. Jones, a good and sufficient deed of conveyance, conveying all his right, title and interest in and to said land and make an assignment of his right of purchase lease", &c. If this means a deed good and sufficient in form releasing defendant's claims, or his right, title and interest, we see no objection to it. If it means a deed conveying a good title not subject to forfeiture, in other words, that the defendant must procure the consent of the Commissioner, it goes too far. By the terms of the decree, however, the form of the deed was to be settled by the Judge, and we will presume that he will settle it in accordance with the views here set forth.

The only case cited *contra* by the defendant that need be specially noticed is that of *Hurlbut v. Kantzler*, 112 Ill. 482. That is distinguishable from this in several respects. For instance, in that case the contract was to sell the lease and not merely the lessee's claims and the lessor not only would not but could not consent to the assignment, for not only had it expressly refused to consent, but the lease had been surrendered and a new lease for a different term had been executed to other parties.

The defendant here contracted to relinquish his claims to the plaintiff and if the latter is satisfied with a release of those claims on the faith that he himself can obtain the Commissioner's consent, we do not see why the defendant should object.

The decree is affirmed on the theory that it requires the defendant to do what he agreed to do, that is, merely release his interest or claims, and so far only on this point. No objection is made to the other terms of the decree. The case is remitted to

the Circuit Judge for such further proceedings as may be necessary, consistent with this opinion.

Wise & Ross for plaintiff.

Smith & Parsons for defendant.

TOMIKAWA v. GAMA.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED OCTOBER 6, 1902. DECIDED OCTOBER 31, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Chapter 64 of the Civil Laws of 1897, relating to Stamp Duties, is not inconsistent with the provisions of Section 8 of Article 1 of the Constitution of the United States and was continued in force by the Organic Act.

The item in the schedule of that chapter relating to stamps on deeds does not provide for unequal taxation and is not invalid.

A decree in equity required the respondent to give to the complainant a good and sufficient deed of certain land. Held, that the giving of an unstamped deed was not a full compliance with the decree.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

This is a suit in equity for the specific performance of a contract to sell and convey land. After the entry of a decree granting the relief prayed for, the respondent in obedience to such decree, executed, acknowledged and filed a deed as to the form of which no objection is made. The respondent, however, failed and refused to stamp the deed as provided by Chapter 64 of the

Civil Laws of 1897. The complainant thereupon moved for an order requiring the respondent to file "a good and sufficient deed which shall conform to the contract between the parties hereto and the final decree of this court made in this cause," claiming that an unstamped deed was not a sufficient compliance with the contract or decree. The court below denied the motion, holding, as we understand its written opinion on file, that our territorial legislature has no power to pass a law providing for the imposition or collection of stamp duties, that under Section 8 of Article 1 of the Constitution all duties must be "uniform throughout the United States", that if our statute is permitted to stand the stamp laws will not be uniform throughout the United States, that the enactment of such legislation is by the Constitution reserved exclusively to Congress and that therefore Chapter 64 of the Civil Laws is unconstitutional and void.

Chapter 64 was not specifically repealed by the Organic Act, although Chapter 65 immediately following it, relating to "Import Duties", was so repealed. The reason for the distinction is, of course, clear. Nor was Chapter 64 repealed by implication. Section 6 of the Organic Act provides that "the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States". Congress in the exercise of its power to govern the Territories had the authority to make the provision just quoted, as also to provide, as in Section 55, "that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable". Taxation,—the imposition of stamp duties for the purpose of revenue is but a method of taxation—is, clearly, a rightful subject of legislation. It was the intention of Congress by the Organic Act to authorize our Legislature to pass tax laws. This is further shown by other portions of the Act. The exercise of this power by the Territory is not inconsistent with the clause of the Constitution relating to uniformity. That clause, we

have already held, "has no application to taxes imposed by Territorial legislatures". *Robertson v. Pratt*, 13 Haw. 590, 597.

That the Act under consideration is constitutional is the conclusion reached by United States District Judge Estee in the case of *Achi v. Kapiolani Estate, Limited*, decided April 24, 1901. See original records in that case.

It is also contended by counsel for the respondent,—this point apparently was not presented or passed upon in the court below—that Chapter 64 in the item as to stamps on deeds provides for unequal taxation and is therefore invalid. The tax prescribed is at the following rates: \$1 on deeds up to \$500; \$2 on deeds over \$500 and up to \$1000; from \$1000 to \$10,000, \$3 for each \$1000 on the whole amount; from \$10,000 to \$50,000, \$4 on each \$1000 of the whole amount; and when exceeding \$50,000, \$5 for each \$1000 of the whole amount. The argument is that this constitutes unlawful discrimination against deeds for the higher amounts. We think that this progressive tax is valid. The classification is reasonable and justifiable. There is no reason for believing or holding that the burden thus imposed upon the wealthier is greater than that imposed upon the less wealthy. All who are within each class are treated alike. On the subject of taxation generally and classification in particular, see *Robertson v. Pratt, supra*, and cases there cited.

The objection that the adhesive stamps in use are not authorized by law because they are stamps "of the defunct Republic" and not issued in the name of the Territory, is untenable. There is nothing in the words, figures or device used, which would render the stamps invalid. The only words denoting the government or jurisdiction are "Hawaiian Islands." The words "Kingdom" or "Republic" do not appear.

For the respondent it is further contended that even though the statute is valid and in force, the giving of an unstamped deed is a sufficient compliance with the decree, and that the statute, if it requires stamps to be affixed, does not place upon the grantor the duty of affixing them. The record before us

does not disclose the precise language of the contract to convey or of the decree; still the proceedings had, the briefs of counsel and the opinion of the court below show that in substance the contract and the decree required the respondent to give a good and sufficient deed. The statute is silent as to whether the stamps shall be affixed by the grantor or by the grantee. The question before us is whether the grantor has complied with this decree by tendering an unstamped deed. Section 927, Civil Laws of 1897, reads: "No instrument requiring to be stamped shall be recorded by the Registrar of Conveyances, *or be of any validity in any court of this Republic*, unless the same shall be properly stamped. Provided that instruments improperly stamped may be received in evidence in Courts of Record if the unpaid duty and penalty be paid to the clerk of the court, and on such payment being made the clerk of the court shall forward the instrument to the Registrar of Public Accounts to be properly stamped." In view of the provision that an improperly stamped instrument may be received in evidence and, apparently, be considered as valid upon payment of the duty, a deed cannot be regarded as void merely because it lacks the necessary stamps. A void deed could not thus be given force and effect. Nevertheless it is clear that an unstamped deed must be regarded as of no validity or force to prove, in any court of this Territory, a conveyance to the grantee. We think that a substantial compliance with the decree requires that the deed tendered be such as to be valid for this as well as for other purposes and therefore hold that the duty is upon the grantor to affix the stamps. We understand that the practical construction of the statute ever since its enactment has been in accordance with this view.

The decree appealed from is reversed and the cause remanded to the Circuit Judge of the Fourth Circuit for such further proceedings as may be proper.

Smith & Parsons for complainant.

Wise & Ross for respondent.

OPINION OF GALBRAITH, J.

I concur in the conclusion announced by the majority that Chapter 64, C. L. is not unconstitutional and void but respectfully dissent from the holding that the grantor must pay the stamp duties required.

It does seem anomalous, at first view, to find "stamp duties" collected under the law of an American Territory, when the Federal Constitution reserves to Congress the power to levy and collect such taxes. However, upon consideration, it is clear that the objection to the legality of these taxes is more to the form than substance. The revenue collected under Chapter 64, is a tax and the several objects on which it is levied are each proper subjects of taxation by the Territorial Legislature. The legislature of a Territory has the undoubted power to require the payment of a fee, or tax,—the amount of the stamp duty prescribed by the statute,—as a condition precedent, to the right of any citizen or subject to invoke the process of its courts, and likewise to demand the amount of the stamp duty for the privilege of having muniments of title placed of record by its Registrar of Conveyances and to prescribe as a penalty for failure to pay that the title papers shall not be used in its courts until such tax or duty is paid.

The fact that these taxes are denominated in the statute, "stamp duties," does not bring them within the inhibition of the provisions of the Federal Constitution so long as the objects on which the taxes are levied are proper subjects of taxation by the Territorial Legislature. The stamps required to be attached to the several documents are really only receipts for the taxes levied and evidence of the payment thereof.

The decree in the suit for specific performance directed the defendant to execute to the plaintiff "a good and sufficient deed" (*ante* p. 176). The defendant in pursuance of that decree tendered a deed presumably "good and sufficient" in form but the stamp duties prescribed by the statute had not been paid. The motion and application to the court was to require the defend-

ant to pay the "stamp duties." The motion was denied and the plaintiff appealed.

It seems to me that the ruling of the court below ought to be sustained on the ground that neither the law nor the decree require the grantor to pay the stamp duties and that if the deed tendered was "good and sufficient" in form, as we are bound to presume it was in the absence of any objection, it was a compliance with the decree and all that the plaintiff had a right to demand. The decree only required that he should execute a conveyance that would pass all of his title to the plaintiff.

It is scarcely necessary to cite authorities to sustain the proposition that a deed good and sufficient in form is as effectual to pass title from the grantor to the grantee without stamps as with them. A deed properly stamped neither conveys more nor less than the same deed would without the stamps. This being true it was not necessary for the grantor to pay the stamp duties in order to comply with the decree of the court unless it was his duty to do so by the terms of the statute.

It will be observed that the statute (Section 918 C. L.) prescribes that "there shall be due and payable to the government" * * * "the several sums for stamp duty" but is silent as to who shall pay this duty. To require the grantor to pay the stamp duty is to read into this statute words omitted by the legislature.

Section 925 sets out a penalty for failure to record a deed or other instrument within three months (from the date of its execution) and section 929 prescribes a further penalty and reads in part "no instrument requiring to be stamped shall be recorded by the registrar of conveyances, or be of any validity in any court of this Republic, unless the same shall be properly stamped."

There is nothing in any of these statutes providing that an unstamped deed is void or ineffectual to convey the grantor's title.

Section 1835 provides that the Registrar of Conveyances shall be entitled "to demand and receive" certain fees: Section 1852, prescribes that "all deeds * * * shall be recorded in the

office of the Registrar of Conveyances," etc. These statutes are likewise silent on the subject as to who shall pay the registration fees. There is the same authority, no more and no less, for the contention that the grantor shall pay the registration fee for recording this deed as there is for that he shall pay the stamp duty. The argument to sustain the one contention will with equal force uphold the other.

The statute declares that the stamp duty shall be paid also that the deed shall be recorded, but does not state who shall pay either the stamp duty or the recording fee. The stamp duty need not be paid at the time of the execution of the deed. It may be paid, without penalty, at any time within three months from that date, (Sec. 925 C. L.). This section seems to be a complete answer to the contention that the grantor should pay this duty. The penalty for failure to pay the stamp duty is a denial of registration for the deed and its use in the courts and the penalty for failure to record is that the deed shall be void as to all subsequent purchasers for value without actual notice of the deed. The grantor has no particular interest in avoiding these several penalties while the grantee has and he also has it in his power to avoid each and all of them if he desires to do so.

The deed tendered, it seems to me, being "good and sufficient" in form and properly executed, was a full compliance with the terms of the decree and the motion should have been denied and this appeal should be dismissed.

ROBERT HIND *v.* EBEN P. LOW.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 14, 1902. DECIDED NOVEMBER 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A partnership of indefinite duration may be dissolved at will, and one formed for a specified period may be dissolved in equity for cause, and probably it may be dissolved at will before the expiration of such period, though the one so dissolving it will be liable to an action for damages for breach of contract and may be denied assistance in equity.

But if the agreement of partnership, though specifying a definite term, also provides that the partnership may be dissolved at the will of any partner at any time, any partner may so dissolve it at will without liability to action for breach of contract or denial of assistance in equity in respect to an accounting and winding up. The agreement in question is held to be of this character.

The court should not interpolate words in a contract unless necessary to effectuate the intention of the parties as gathered from the whole instrument.

An agreement to arbitrate which is general and does not make submission to arbitration a condition precedent to the right to sue does not prevent suit without first submitting to arbitration.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill for an accounting and for winding up a partnership. The bill sets out the agreement of partnership, dated October 1, 1893, between the plaintiff and defendant, under which they have ever since conducted a large stock ranch at Kohala on the island of Hawaii; also certain reasons why the plaintiff desires a dissolution of the partnership, the fact that he has notified the defendant that it is dissolved, has demanded a

settlement, the defendant's refusal, etc., and prays for an accounting and a sale of the property and distribution of the proceeds. The answer, which, like the bill, is somewhat lengthy, goes into the various reasons alleged by the plaintiff for his desire to dissolve the partnership, and alleges that no good cause exists for its dissolution, and that by the terms of the agreement the partnership is to continue for the term of twenty-five years and misunderstandings are to be settled by arbitration.

The Circuit Judge, treating the answer as a demurrer, overruled it on the ground that the partnership could be dissolved at will under the terms of the agreement. He did not go into the question of arbitration. The defendant appealed.

The only questions before us are whether the agreement permits a dissolution of the partnership by one of the partners without cause before the expiration of the twenty-five years for which the partnership was formed, and whether the provision for arbitration prevents the plaintiff from coming into equity.

There is no doubt that a partnership formed for no particular period may be dissolved at will by any partner, and that a partnership formed for a particular period may be dissolved for cause in equity before the expiration of that period. And probably the preponderance of authority at the present time supports the view that a partnership, though formed for a particular period, may be terminated at will by any partner before the expiration of that period, although by doing so such partner renders himself liable to an action for damages for breach of contract and may be denied the assistance of a court of equity. See *Karrick v. Hannaman*, 168 U. S. 328; *Lapenta v. Lettieri*, 72 Conn. 377; *Shumaker, Partn.*, 409-414; 2 *Bates, Partn.*, §577; *Mechem, Partn.*, §239. But, although a partnership is formed for a definite period so as to continue for that period, unless sooner dissolved, and so as to determine by limitation at the expiration of that period, unless further continued by a new agreement, express or implied, the agreement of partnership may contain a provision that the partnership may be dis-

solved before the expiration of the specified period upon the happening of certain contingencies or at the will of any partner, in which case, if any partner, in accordance with such provision, dissolves the partnership before the expiration of such period, he will not be liable in an action for damages or denied assistance in equity. See *Swift v. Ward*, 80 Ia, 700.

The plaintiff's contention is that the agreement in question is of this last above mentioned kind, and that the partnership in question may be dissolved at will by either partner. The question is therefore whether that is the proper construction of the agreement. The clauses bearing upon this question are the following:

"The said parties agree to associate themselves as Copartners, for a period of twenty-five years from this date, in the business," &c.

"And further, should either partner *desire*, or should death of either of the parties, or other reasons, make it necessary, they, the said copartners, will each to the other, or, in case of death of either, the surviving party to the executors or administrators of the party deceased, make a full, accurate and final account of the condition of the partnership as aforesaid, and will, fairly and accurately, adjust the same. And also upon taking in inventory of said Capital Stock, with increase and profit thereon, which shall appear or is found to be remaining, all such remainder shall be equally apportioned and divided between them, the said copartners, their executors or administrators, share and share alike."

"It is also agreed, should either partner desire to retire or wish to sell his half interest, the retiring partner should give the refusal and first chance to his partner to buy all his title and interest in said Copartnership."

The plaintiff contends that the second of these quoted paragraphs, fortified by the third, makes the partnership terminable at the "desire" of either partner. Counsel for the defendant contend that the second paragraph, if read literally, is inconsistent with the first, and that consequently in order to harmonize them, the second paragraph, which, if either, is the ambiguous one, should not be construed literally. Counsel differ as to just how it should be construed to make it harmonize with

the first paragraph. One contends that it should be held to mean that the partnership may be terminated at the "desire" of either party "for cause," although nothing is said about cause. The others contend that it should be so terminable "after the expiration of the twenty-five years," although nothing is said as to the time when the desire may be exercised.

The presumption is that the parties meant just what they said, and the court should not add to the language of the agreement unless it is clear from the whole instrument that that is necessary in order to effectuate the intention of the parties. The view that the parties meant what they said when they wrote "desire" in the second and third of these paragraphs without qualification, is supported by several other considerations. For instance, in the same sentence in the second paragraph, and in immediate connection with "desire," two other causes of dissolution are mentioned, namely, "death of either of the parties," and "other reasons," each of which obviously had reference to the time within the twenty-five years. The third paragraph also obviously had reference to the same period. It may be added that the partnership would terminate *ipso facto* under the first paragraph at the end of the prescribed period and that there was therefore no occasion for a provision that it might be terminated at "desire" *thereafter*. Furthermore, there is no necessary inconsistency between the first and second paragraphs. The two may be construed together as meaning that the partnership should continue for twenty-five years and then determine, unless determined sooner or continued longer by some further act or event. It is common to insert in agreements of partnership for a specified period a provision for dissolution at will after a certain time within such period, and, if that can be done, it can with equal consistency, if not so wisely, be agreed that that option may be exercised at any time. A form for just such an agreement is found in Jones' Forms, 5th Ed., 632.

The clause relating to arbitration is as follows:

"It is also agreed that in case of a misunderstanding arising with the partners hereto, which cannot be settled between them-

selves, such difference of opinion shall be settled by arbitration, upon the following conditions to wit: Each party to choose one arbitrator, which two thus elected shall choose a third; the three thus chosen to determine the merits of the case, and arrange the basis of a settlement."

It is difficult to see how a question of the "desire" of one of the partners to terminate the partnership could come within the scope of this provision or be a suitable matter for arbitration. But, however that may be, it is well settled that an agreement to arbitrate which, as here, is general and does not make a submission to arbitration a condition precedent to the right to sue, does not prevent suit without previous arbitration. *Pearl v. Harris*, 121 Mass. 390; *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Kinney v. Baltimore & O. Emp. Ass.*, 15 L. R. A. (W. Va.) 192 and Note; 2 Am. & Eng. Enc. Law, 2nd. Ed. 570 *et seq.*

The decision and decree appealed from are affirmed and the case remitted to the Circuit Judge for such further proceedings as may be proper.

Kinney, Ballou & McClanahan and *H. A. Bigelow* and *S. H. Derby* for plaintiff.

T. I. Dillon, J. A. Magoon, J. Lightfoot and *E. C. Peters* for defendant.

IN THE MATTER OF THE GUARDIANSHIP OF
JAMES HOARE, a Minor.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 14, 1902. DECIDED NOVEMBER 7, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If a guardian mixes the trust funds with his own and keeps no separate account which is complete, reliable or satisfactory, he must be charged with interest upon money which he permits to lie idle for an unreasonable length of time.

A guardian is chargeable not only with rents actually received by him from the property of his ward but also with such additional rents as he would have obtained had he faithfully and diligently discharged his duties.

While a guardian should be allowed all sums reasonably necessary for the maintenance of the ward and paid by him for such purpose out of the income of the estate, still, where it appears that such payments were made by a deceased guardian, not at regular intervals or in regular amounts, but only irregularly as necessity required, the guardian's estate cannot, upon an accounting by the executor of the will of the deceased guardian, be allowed, in addition to payments shown to have been actually made, a lump sum for further payments not shown to have been made but based merely upon conjecture.

A guardian who is guilty of gross negligence in the performance of his duties is not entitled to commissions.

OPINION OF THE COURT BY PERRY, J.

A. Rosa was, on May 4, 1880, appointed guardian of the estate of James Hoare, a minor. The first annual account was filed by him on July 15, 1881. He died in September, 1898, without having rendered any other account of his administration of the trust. After motion therefor, the executor of the will

of the deceased guardian filed, in 1901, an account of receipts and expenditures purporting to cover the period from July, 1881. This account and a supplement thereto subsequently filed, were examined and reported upon by a Master. The latter's report was, after exceptions and hearing thereon, confirmed by the probate court, and it is from that decree of confirmation that this appeal is taken.

Four points are relied upon by the executor appellant. The first is that the Master erred in surcharging the guardian with interest on the sum of \$284.07 found by the Master to have been on hand and uninvested for a period of eleven years. To the finding itself no objection is made, but the contention is that it was not only proper but necessary for the guardian to retain that small sum on hand in order to meet contingent expenses. Under some circumstances, the retention by a guardian of a small sum of money, uninvested, would be justifiable and he would not be chargeable with interest for so retaining it, but such a case is not here presented. It appears from the report of the Master and otherwise from the record that the guardian in the case at bar did not keep the funds of his ward entirely separate from but mixed them with his own, that he kept no reliable or satisfactory account of his receipts or expenditures in his trust capacity, that for a period of over nineteen years no account of his doings was filed in court, and that in other respects he was guilty of negligence in the administration of his trust. Under these circumstances, the guardian was properly charged with interest upon the sum which he failed to invest for the period stated. See *Knowlton v. Bradley*, 17 N. H. 458, 460; *Starrett v. Jameson*, 29 Me. 504, 506; *Mulholland's Estate*, 176 Pa. St. 411, 417; 15 Am. & Eng. Encycl. Law, 2nd Ed., 95.

The second point is, "that the computation of rents by the Master in his report was grossly erroneous and unfair to the estate" of the deceased guardian. The estate of the ward at the time of the institution of the trust consisted, with but slight exceptions, of a certain piece of land with the buildings thereon

situate at or near the corner of Alakea and King streets in this city. On July 25, 1881, certain adjoining land was, by leave of court, purchased by the guardian for \$1010, and the whole property was thereupon mortgaged for the sum of \$2300. Of the sum thus borrowed, about \$1300 was used in repairing the buildings upon the entire property. The mortgage was foreclosed on November 1, 1892, and the property sold. The main source of income of the estate was the rent derived from these premises. The Master, whose report shows that his work was done with much care and with thoroughness, found, and the correctness of the finding is not questioned, that the rent account kept by the guardian was incomplete and cannot be relied on as showing total rents collected. Following the statement of this finding the Master says in his report: "I think that from the time the first marked decline in rents begins the guardian should be charged, not with the rent shown in his final account and the additional vouchers filed with me, but with the amount of rental the estate was capable of producing as shown by the rents accruing in preceding years and actually collected and that in determining this water rates paid by tenants should be included as being rent under a different name." The principle so adopted was, we think, correct and applicable. A guardian is chargeable not only with the rents actually received but also with such additional rents as he would have obtained had he faithfully and diligently discharged his duties in that respect. The Master found that the guardian was not diligent in the collection of rents or careful in the choice of tenants.

The rents actually received were, as shown by the final accounts of the guardian: 1880, \$191.00; 1881, \$372.50; 1882, \$636.25; 1883, \$668.75; 1884, \$508.45; and, not including water rates, 1885, \$222.25; 1886, \$170.00; 1887, \$343.00; 1889, \$323.00; 1890, \$289.00; 1891, \$475.00; 1892, \$201.75. The Master recommended that the guardian be charged with the rent actually received, that accrued in 1880, 1881, 1882 and 1883 as appears in the guardian's account and that for the years 1884 to 1892, 8 10-12 years, he be charged with the sum

of \$668.75 per year, that being the total collected in 1883 and giving, in the Master's opinion, the most reliable evidence of the income which the estate with reasonable care was capable of producing. For the appellant it is contended that this estimate is too high and unfair because the buildings, although repaired in 1881, must have been again in need of repairs in the later years of the term under consideration. The Master in his report says that some evidence was adduced by the executor bearing upon this point, but made no express finding as to the condition of the buildings at the time in question. In this connection, we must call attention to the fact that no transcript of the evidence taken before the Master has been furnished us on this appeal and that therefore the Master's findings and the decree appealed from must be sustained unless error appears on the face of the report.

It is due to the neglect of the guardian alone that more definite data were not available for the assistance of the Master or of the court in determining the true state of the account. We cannot, as the record now stands, say that the Master has erred in his statement of the account or, with assurance, that we can make a different finding more in conformity with justice. "Having no certain and reliable data on which to proceed, he" (the Master) "was authorized to exercise a sound discretion, upon the whole evidence presented, and so to state his account as to do justice to all persons, as nearly as practicable. * * * And the defendant, who by his negligence has caused this necessity, is not in a position to complain."—*Miller v. Whittier*, 36 Me. 577, 585.

The claim that the Master has twice charged against the guardian a certain item of \$714 for rents, we find to be unsupported by the record.

The appellant's third point is, "that the portion of the Master's report in which he totally disallowed all amounts filed for the support of the ward according to the calculation in said account—was erroneous and that said account for support of ward should have been allowed." It is inaccurate to say that

the Master disallowed all amounts claimed for the support of the ward. In the original account appear items of this class in the total sum of \$158.00 and these were allowed. So, too, the Master allowed, out of a total of \$195.00 claimed in the supplementary account, items to the amount of \$150.00 for which vouchers were produced. He did disallow, however, the balance of \$45.00 of these items and also the item of \$1290.00 claimed in the supplementary account. Of the last mentioned item the Master says: "There is a claim in the supplemental account for \$1290.00 for support of the ward, being calculated at \$10.00 a month for all months, 1880 to 1892 inclusive, in which no payments for support appear. But the vouchers as far as they do appear show that the guardian did not regularly pay \$10.00 a month or pay any regular allowance. The ward was during this period cared for by his grandaunt Waikane. A receipt by her dated December 17, 1887, for moneys received in October, November and December, 1887, shows payment to her for ward's support of \$5.00 in October, \$3.00 in November, \$15.00 in December. A letter from her to the guardian of November 5, 1885, acknowledges receipt of \$10.00 and at once asks for more for school books, hat, shoes, etc. It is quite possible that she asked for money only as there was special need and the guardian paid irregularly. There being no proof that a regular allowance was made Waikane, the guardian of the person of James Hoare by the guardian of the estate, I recommend the disallowance of this item."

As stated by the Master and as appears from the supplemental account itself, the amount of \$1290.00 was arrived at by the executor simply by ascertaining the number of months during which no payments appeared in the accounts, 129, and then claiming a payment of \$10.00 for each of those months,—by pure conjecture and not otherwise. The finding of the Master that there is no proof of a regular allowance to the guardian of the person but that on the contrary the payments appeared to be at irregular intervals as necessity required, cannot, upon the

state of the record already alluded to, be disturbed. The disallowances are confirmed.

The executor claimed in the account \$409.10 as commissions of the guardian. Of this, \$38.64, allowed upon the filing of the first annual account, was allowed by the Master, and the remainder disallowed. In this it is contended,—fourth point—that there was error. We think otherwise. “The law is clear that statutory commissions are provided for the faithful and proper execution of trusts and where an administrator does not comply with the duties devolved upon him by his appointment, he is not entitled to commissions.”—*In re Estate of Akana*, 11 Haw. 420, 422. The same rule applies to guardians. See *In re Estate of Joseph Lazarus*, 13 Haw. 242, 245, and *In re Estate of Alina*, *Ib.* 388, 390. Under the circumstances of this case, already recited, the ruling of the Master in this respect is sustained.

The decree appealed from is affirmed.

L. Andrews for executor of will of guardian.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for ward.

H. HACKFELD & Co., Limited, Plaintiff in Error, v. HILO
RAILROAD Co., Limited, Defendant in Error.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED OCTOBER 11, 1902. DECIDED NOVEMBER 10, 1902.

GALBRAITH AND PERRY, JJ., AND CIRCUIT JUDGE ROBINSON IN
PLACE OF FREAR, C.J., DISQUALIFIED.

A material-man of a sub-contractor is one of the class designated by
Section 1 of Chapter 21 of the Laws of 1888 as entitled to the
lien therein provided for.

Such material-man is given the lien by the statute even though no contract to furnish the materials is entered into by him with the owner of the structure.

A material-man has a right to rely upon the lien given him by law as well as upon the personal liability of the sub-contractor and the presumption is, in the absence of any showing to the contrary, that in furnishing the materials he intends to avail himself of both remedies so far as necessary.

The fact that the materials are charged on the material-man's books to the contractor alone affords some evidence that they were furnished on his credit, but is not *prima facie* evidence that his credit was relied on to the exclusion of the credit of the building.

Cash advanced to a sub-contractor to be used by him in paying the laborers engaged in grading the line of a railroad, is not, within the meaning of the statute, either labor or material to be used in the construction of such railroad.

When the declaration has been filed and process issued, with the intent that service be made promptly, proceedings have been "commenced" within the meaning of the provisions of Section 2 of Chapter 21 of the Laws of 1888 that "the lien shall continue for three months, and no longer, * * * * unless the same shall have been satisfied or proceedings commenced to collect the amount due thereon by enforcing the same."

OPINION OF THE COURT BY PERRY, J.

H. Hackfeld & Co., Ltd., brought an action in the Circuit Court of the Fourth Circuit to enforce a lien claimed against certain property of the defendant. The case was tried without a jury and judgment rendered for the defendant. Thereupon a petition for a writ of error was filed, error being assigned in certain findings of fact and rulings of law made by the trial court. Undisputed evidence shows the following facts:

On April 5, 1900, J. H. Smith and W. W. Corey, copartners, entered into a contract with the Hilo R. R. Co. whereby they agreed to do, according to certain specifications, all the grading necessary for the construction of "the Hilo railroad for a distance of about ten miles, being from station 431 at the southerly limit of the Olaa Cane Land to the Lava Flow of

1840." On the 10th of the same month, Herman Elderts agreed with Smith and Corey to grade all of that portion of the road lying between stations 431 and 642. Thereafter Hackfeld & Co., the present plaintiffs, agreed to furnish and did furnish to Elderts certain wheelbarrows, tools, blasting powder, lumber and other material, to be used in the construction of said road-bed, and also furnished cash with which Elderts was to pay the laborers employed. The bill of particulars made a part of the notice of lien and declaration in this action is a correct statement of the items so furnished by the plaintiff to Elderts. The work done by Elderts was completed on October 4, 1900. A part of the cash advanced was repaid, but the balance of the debt due for the money loaned and for the materials furnished is still due and unpaid. For the amount of all of such unpaid balance the plaintiff claims a lien upon the railroad and its appurtenances. Notice of such lien was filed on December 19, 1900.

The trial court found, in substance, the foregoing facts. The following findings of facts and rulings of law were also made:

"10. That the evidence in this case shows quite clearly and satisfactorily that the plaintiff herein never had a contract, written or oral, expressed or implied, with the defendants Smith and Corey or the Hilo R. R. Co., Limited.

"11. That no privity existed between the plaintiff herein and the Hilo R. R. Co., Limited, or Smith and Corey, in respect of the transaction out of which this litigation grew.

"13. That no assignment of his contract or agreement with Smith and Corey by the sub-contractor, Herman Elderts, co-defendant herein, was made to the plaintiff, nor was any substitution of parties plaintiff sought or obtained by said plaintiff prior to the filing of the lien by the plaintiff, or prior to the bringing of this suit, or at any other time, or at all.

"1. The court concludes that in the absence of an assignment to which the owners or original contractors consented in writing to the sub-contract or agreement by and between the co-defendant, or sub-contractor, Elderts, and the plaintiff herein, that plaintiff cannot be substituted to the rights or liabilities of the co-defendant, Herman Elderts.

"2. That it is essential in order for plaintiff to maintain its

action that there should exist a privity between the plaintiff and defendants Hilo R. R. Co., Limited, and Smith and Corey in respect of the matter sued on.

"3. That the filing of the lien and notice by the plaintiff herein did not make plaintiff a party to the contract nor bring it within the statute in the absence of the assignment and consent referred to in conclusion number 1 herein, nor does our statute work a subrogation of the sub-contractor's rights to the rights of any one else."

The plaintiff was the material-man of a sub-contractor. If it falls within the class designated by our statute to which a lien is given for certain materials, it is entitled to such lien even though no contract was entered into by it with the owner of the railroad or with the original contractor. In the ordinary sense, the lien does not arise out of contract but is given by law to those who are placed under certain stated conditions; it arises out of contract in the sense only, that, the statute declaring that a lien shall exist under those circumstances for the price of certain materials, the owner, when he awards a contract for the erection of a structure of his, is conclusively presumed to have so contracted with reference to the law and to have voluntarily subjected his property to the rights thus given to material-men and contractors. "This argument rests upon a misconception as to the nature and character of a mechanic's lien. This lien is a creature of the statute, and was not recognized at common law. It may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. * * * Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material-man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."—*Van Stone v. Stillwell &*

Bierce Mfg Co., 142 U. S. 128, 136. See also *McMurray v. Brown*, 91 U. S. 257, 266; *Central Trust Co. v. R. R. Co.*, 68 Fed. 90, 94, 95; Phillips Mech. Liens, §118; *Allen & Robinson v. Redward*, 10 Haw. 151.

The class to which the benefit of such liens is granted, is, of course, broader in some jurisdiction and more limited in others. Just how large it is in any particular case is to be determined in view of the provisions of the statute in force in that jurisdiction. Section 1 of our statute (Chapter 21, Laws of 1888) reads: "Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking, shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated." This language is very broad, broader, perhaps, than that of the statutes in many of the states. *Any* person, with but two limitations, shall have a lien. Those limitations are (1) that such person shall furnish the labor or material and (2) that such labor or material shall be furnished specifically to be used in the construction or repair of the structure sought to be charged with the lien. In *Allen & Robinson v. Redward*, *supra*, the lien of a material-man of an original contractor was recognized and enforced, and, while the point was, perhaps, not necessary to be determined, the Court would seem to have been of the opinion that *any* material-man or sub-contractor had a lien. At page 153 it said, "the Circuit Court correctly held that the amount for which the property may be charged with a lien in favor of a sub-contractor or material-man is not limited to the amount payable by the owner to the contractor," and, after quoting section 1 (at p. 154), "This section of the statute gives a lien to 'any person furnishing material' and makes no distinction between contractors and sub-contractors. Other sections, 5 and 6, show clearly that sub-contractors were intended

to be included." We add that, in our opinion, the statute makes no distinction between sub-contractors and material-men, or as to whether the latter deal directly with the owner, or with the original contractor or with any sub-contractor. As we construe it, if the material was sold to be used and was in fact used in the construction of the building, the person furnishing it has a lien. Whether a lien would exist for material furnished to be used but not in fact used in the construction of the building, need not be decided in this case.

Another finding made by the trial court is: "That in pursuance of the said contract between the plaintiff and co-defendant Herman Elderts, this plaintiff furnished all of the items and the cash set forth in plaintiff's Notice of Lien, to the said Herman Elderts on his personal account." To what extent, if at all, the court below based upon this finding its judgment that plaintiff was not entitled to a lien, is not clear. If the finding was intended to mean that in furnishing the material Hackfeld & Co. relied *exclusively* upon the credit of Elderts and waived its right to a lien upon the property of the Railroad Co., the finding was unsupported by the evidence; if, on the other hand, the court meant merely that the plaintiff charged the goods upon its books to Elderts and that it intended not to waive its claim for payment upon Elderts personally, then, while that was undoubtedly the fact, it would constitute no defense against the lien. The material-man had a right to rely upon the lien given him by law as well as upon the personal liability of the sub-contractor and, having that right, the presumption is, in the absence of any showing to the contrary, that he intended to avail himself of both remedies so far as necessary. "A sub-contractor, laborer, or material-man, in dealing with the contractor, is presumed to rely upon his lien upon the property. It is not necessary for him to prove affirmatively that he relied upon the credit of the building, if his labor or materials actually entered into its construction. The burden is upon the land-owner to show that he relied upon the credit of the contractor alone. The law gives the sub-contractor the right of a lien if

he complies with its requirements, and it is always to be presumed that he accepts the benefits the law confers. The fact that he brings himself within the requirements of the statute, and afterwards seeks to enforce his right, is sufficient proof that he intends to rely upon this right."—2 Jones on Liens, §1284. "The fact that the materials are charged on the plaintiff's books to the contractor alone affords some slight evidence that they were furnished on his credit, but is not *prima facie* evidence that his credit was relied on to the exclusion of the credit of the building."—*Hommel v. Lewis*, 104 Pa. St. 465. "It was not necessary to the creation of such a lien that complainants should have had an understanding that they intended to claim it. Nor is it important that they charged Larkin personally with the debt. They were entitled to both securities,—his personal liability and a lien on the property—and their reliance on the one did not impair their right to rely on the other also. They could not be put to an election between the two so long as that debt, or any part of it, remained unpaid. Nothing is shown to have been said between complainants and Larkin, either about his personal obligation to pay the debt, or the liability of the property. That, however, is of no consequence, for the lien arose, as a matter of law, from the transaction itself, and his contract for the materials made him personally liable."—*Basset v. Bertorelli*, 22 S. W. (Tenn.) 423, 424. See also *Jones v. Swan & Co.*, 21 Ia. 181, 184; *Clark v. Huey*, 12 Ind. App. 224, 234; *Wolf v. Batchelder*, 56 Pa. St. 87, 88; 2 Jones on Liens, §1332.

The ruling of the court below to the effect that the plaintiff has no lien upon the defendant's railroad for the cash advanced by it to Elderts with which the latter was to pay the laborers engaged in the grading, was, we think, correct. Cash advanced for that purpose was not, within the meaning of the statute, material to be used in the construction of the road-bed nor was it labor. The position is the same as if the money had been loaned to Elderts for the purpose of purchasing from another material for the road. If, in such case, Elderts had failed to

pay for the material, would both Hackfeld & Co. and the one actually selling and delivering the material have had a lien on the road? Clearly not. On this point, see *Godeffroy v. Caldwell*, 2 Cal. 492.

The foregoing questions are all raised by the plaintiff's assignment of errors. Whether or not the lumber furnished by the plaintiff and used by Elderts in erecting near the line of road buildings for the protection or accommodation of laborers employed in the grading, was material used in the construction of the railroad, within the meaning of the statute, need not be now determined. A similar question may arise later concerning some or all of the tools used during the progress of the work.

On the part of the defendant in error, the judgment is sought to be supported on the ground, among others, that proceedings to collect the amount due on the lien were not commenced within three months after the completion of the structure against which it was filed and that therefore the lien, if it ever existed, has been forfeited.

It may be assumed for the purposes of this branch of the case that the "structure" contemplated by the statute is the portion of the railroad situate between stations 431 and 642, and not the whole railroad, and that the structure, as thus understood, was completed on October 4, 1900. Other facts material in this connection are that the plaintiff's declaration, of which a copy of the notice of lien and bill of particulars was made a part, was filed in the Circuit Court of the Fourth Circuit on December 21, 1900, and that summons in the ordinary form was issued on the same day. On or before December 24, 1900, service was made upon one Lambert as the agent of the defendant corporation, but the sheriff's original return of this service is not with the records in the case. On July 31, 1901, a certificate reading as follows, was, by leave of court, filed by the sheriff: "I, Elderts, Deputy Sheriff of the Island of Hawaii, do hereby certify in addition to my certificate made on the summons returned in this cause on the 24th day of December, 1900, that I made due and diligent search within the jurisdiction of

this court for some officer, president, secretary, treasurer of the said defendant corporation, and I was unable to find either of such persons, and that I made service of said summons and complaint upon W. H. Lambert, the agent of said defendant corporation in charge of the business of such defendant corporation on the Island of Hawaii, and at South Hilo, aforesaid. The manner of such service upon the said W. H. Lambert has been certified to by me, to which certificate I append this addition." This refers, as we understand it, to the service already mentioned. On March 6, 1901, service of process was made on B. F. Dillingham, president of the defendant corporation.

For the defendant it was contended in the lower court on plea in abatement and is contended now, that the service attempted to be made in December, 1900, was not valid because not made on one authorized by law to receive or accept it for the corporation or to bind it thereby. Let it be assumed for the purposes of this case that this contention is sound. It still remains true and undisputed that the service of March 6, 1901, was good and valid. The question is, when are proceedings to be deemed to have been *commenced*?

"For certain purposes an action may be held to be commenced, while for other purposes the courts may deny to the action the attribute of a 'commenced' suit. But generally speaking, not noting the exceptions to and the qualifications of the doctrines, the legislation of the states and the adjudications follow three main classifications, to wit: the action is commenced when the complaint is filed, when the process is issued, or when the process is served on the defendant."—1 Encycl. Pl. & Pr. 119. One class of cases is to the effect that the suit is commenced when the petition is filed, provided it is filed with the intent that process be promptly issued and served, and another class that it is commenced when process is issued provided it is issued with the intent that it be promptly served. As between these two last mentioned lines of decisions, we need not determine now which is founded on the better reasoning, because in the case at bar not only was the declaration filed but process was

issued within the time prescribed by law and these acts were done, so far as appears from the record, with the desire and intention on the part of the plaintiff that service should be made as soon as possible.

Section 2 of the statute on liens, says, in part: "The lien shall continue for 3 months, and no longer, after the completion of the construction or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforcing the same." The nature of the proceedings necessary to be followed in order to enforce the lien is set forth, in a general way, in Section 5. "The liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction, by service of summons, as now practiced. Such summons shall set forth the ordinary allegations in assumpsit, and, in addition thereto, note that a lien has been filed. Before proceeding to trial, the defendant shall be served with a detailed specification of the claim, provided that no such specification shall have been furnished before proceedings were commenced. Judgment upon such proceedings shall be as in ordinary cases, and may be enforced by execution as now allowed. In case the contract for services or material upon which the lien has accrued shall have been directly with the owner of the property, an attachment may issue in connection with the suit upon the filing of a bond of indemnity to the said owner in such sum as the Magistrate or Court may fix. If it shall appear that such bond is insufficient, the Magistrate or Court, shall cause a new bond to be filed for a greater amount, or with additional security." There is nothing in the section last quoted or in any other portion of the Act, making it essential that service be had before the action can be regarded as commenced. The "service of summons" referred to in section 5 is but one step in the proceedings. Other steps are mentioned in the same section, as, for example, the service of a detailed specification of the claim, the

judgment "as in ordinary cases," execution "as now allowed," and, under certain circumstances, an attachment. "Service of summons, as now practiced," presupposes the filing of a declaration and the issuance of summons. Certainly not all of these steps need be taken in order to satisfy the provisions of section 2. Where is the line to be drawn? Whether the mere filing of the declaration would be sufficient or not, we are of the opinion that when the declaration has been filed and process issued, with the intent that service be made promptly, proceedings have been "commenced" within the meaning of the statute under consideration. This gives to the language used by the legislature its ordinary meaning and accords with justice. To hold otherwise would be to cause the plaintiff to suffer for the possible negligence or wrong-doing of the sheriff and for fraudulent evasion of service by the defendant. Under our statutes, Civil Laws, § 1218, it is the duty of the sheriff, and not of the plaintiff, to serve process.

In *Hail v. Spencer*, 1 R. I. 17, 19, 20, in holding that the issuing of the writ is the commencement of the action, the court said: "Now it is admitted that the writ, in this case, was issued prior to the expiration of the six years, and, unless, the actual receipt of the service of it, by the officer, be necessary to constitute the commencement of the action, it was commenced within the six years. In the ordinary acceptation of terms, the action is certainly commenced when the writ is issued, but to answer the intent of the statute, is something more than this required? If more, what is it? Is it the service of the writ? If so, it is the sheriff who commences the suit, and not the plaintiff. And the ability of the sheriff to make the service may depend on a thousand circumstances, over which neither he nor the plaintiff may have any control; nay, even on the will of the debtor himself, as his absence from the county. We cannot suppose that the legislature, in any event, intended to make a man's rights dependent on such contingencies.

"Is it the receipt of the writ by the sheriff that is required in order to constitute the commencement of an action? If so, its commencement may still depend on contingencies wholly inde-

pendent of the plaintiff, as the sheriff's occasional absence, his sickness, or his want of official qualifications. But at any rate, why should the receipt of it by the sheriff be required. As long as the defendant is untouched by the precept, of what consequence is it to him, whether it be in the hands of the plaintiff or the sheriff? How can his liability be affected by this or that event? The truth is, that in contemplation of law, the writ is issued on the application of the creditor, by the sovereign power of the state, through the instrumentality of its officers. It is the state's precept or command, and is issued and the action commenced, whenever it is in the hands of the plaintiff, or his attorney, ready to fulfill its purpose. In this view the commencement of the action depends wholly on the will, or the diligence of the plaintiff. If he loses his right, it is wholly the result of his neglect. It should, however, be followed up by such acts as show that it is a real and not a pretended commencement of a suit. For if there be an unusual lapse of time between the day of the date of the writ, and that of its delivery to the sheriff, and wholly unexplained, it might raise a presumption against the correctness of the date, which would force on the plaintiff the necessity of proving its correctness." See also *Cross v. Barber*, 16 R. I. 266; *Gosline v. Thompson*, 61 Mo. 471; *Spofford v. Huse*, 9 Allen 575, 6; *Bunker v. Shed*, 8 Met. 150, 3; *Tribby v. Wokee*, 74 Tex. 142, 3; *Day v. Lamb*, 7 Vt. 428.

If, then, the plaintiff in filing its declaration and in procuring the issuance of process, acted with the necessary intent, these proceedings were commenced within the time required and its lien was continued in force. Upon the present state of the case the judgment under review cannot be supported on the theory that such intent was lacking.

The judgment is set aside and a new trial ordered.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for plaintiff.

Hatch & Silliman and *F. W. Milverton* for defendant.

ALBERT K. NAWAHI *v.* HAKALAU PLANTATION
COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 13, 1902. DECIDED NOVEMBER 11, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Sugar cane is a crop subject to the law of emblements, although it is not sown and may require more than a year to mature.

A guardian cannot make a lease of the ward's land to extend beyond the latter's majority so as to bind the ward as to the excess beyond that time, but such a lease is binding on the lessee and may be ratified or disaffirmed by the ward upon attaining his majority.

If the ward disaffirms the lease on coming of age the lessee will be entitled to emblements, as the term is one of uncertain duration as to its termination or continuance at that time.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of trespass for \$20,000 for removing a crop of sugar cane from certain lands belonging to the plaintiff. The only question is whether the defendant was entitled to the crop under the law of emblements. The question comes here on an exception to a ruling of the trial Judge sustaining the defendant's demurrer and dismissing the plaintiff's action.

The defendant had been in possession under a lease made by the guardian of the plaintiff (then a minor) for ten years from July 1, 1897, but the minor upon coming of age notified the defendant, in January, 1902, that the lease was terminated and requested possession, but the defendant continued in possession long enough to harvest the then growing crop.

The general rule is that when a tenancy is of uncertain dura-

tion and is terminated through no act or fault of the tenant, he, or his representative, is entitled to the annual crops then growing upon the land. Thus there are in general three essentials—(1) uncertainty of the term, as in the case of an estate for life or at will; (2) termination of the tenancy through no act of the tenant, as by act of God as where a life tenancy is terminated by death, or by act of the law as where a tenancy during coverture is terminated by divorce, or by act of a landlord as where he determines a tenancy at will; and (3) the annual nature of the crop, by which is meant not so much that it must be planted or sown annually or even harvested strictly within a year as that it is the result of annual care and labor. This law is based on the policy of encouraging industry by giving to tenants the results of their own labor in cases where the expenditure of such labor is not due to their own folly. If a tenancy were to determine at a known time or through the act of the tenant, it would be his own fault if he planted a crop which could not be harvested until after the termination of the tenancy; but if he could not know when the tenancy would determine he would, but for the law of emblements, be discouraged from planting or sowing or cultivating, for he could not know whether he or another would reap the results of his labor. See, in general, 8 Am. & Eng. Enc. Law, 2nd Ed. 302, 318; 2 Taylor, *Ld. & Ten.*, Sec. 534; Wood, *Ld. & Ten.*, Sec. 561.

It is not disputed in this case that the tenancy was determined through no act or fault of the tenant.

As to the annual nature of the crop—although much of the opinion of the Circuit Judge was devoted to the question of whether sugar cane was a crop of this nature, especially considering that it is not sown and may require more than a year to mature, counsel do not in this court seem to dispute that it is, and the principles above set forth would seem to require the adoption of this view.

The only question remaining, therefore, is whether the tenancy was one of uncertain duration. It is contended that the guardian could not make a lease of the ward's lands to extend

beyond the latter's minority and that the excess beyond that time is void, and consequently that the lease must be regarded as one for a definite period, that is, until the ward should become of age. There is no doubt of the correctness of the premises in this argument and of the general statements cited from the authorities in support of them if we read them in the sense intended by those authorities. It is true that a guardian cannot lease the ward's land for a period beyond his minority, that is, so as to bind the ward, and that the excess beyond that time is void—at the option of the ward. In other words the lease is binding on the lessee after that time unless the ward terminates it and it may be ratified or disaffirmed by the ward at his option. It is not absolutely void as to the excess, that is, null for all purposes and incapable of ratification. It is merely voidable even as to the ward and not voidable at all by the lessee. See *Van Doren v. Everitt*, 5 N. J. L. 460; *Snook v. Sutton*, 10 N. J. L. 133; *Campau v. Shaw*, 15 Mich. 226. This is conceded in argument, and yet counsel insist on their conclusion from the premises stated by them in spite of these material qualifications of those premises.

The lessee was absolutely bound, the ward or landlord might or might not, at his option, terminate the lease on arriving at majority. The lessee, therefore, could not know whether the tenancy would terminate then or not. The tenancy, therefore, was of uncertain duration. If, as in *Thomas v. Noel*, 81 Ind. 382, the occupant knew that his right of possession would terminate at a particular time unless he himself performed some act before that time the case might be different. But where, as here, the termination or continuance of the tenancy depended entirely on the will of the landlord, the tenancy must be regarded as of uncertain duration so far as its termination or continuance at that time is concerned.

The exceptions are overruled.

T. I. Dillon, J. A. Magoon and C. W. Ashford for plaintiff.
Hatch & Silliman and B. L. Marr for defendant.

ARTHUR M. BROWN, *Ex rel.* LEE WAI *v.* HAWAIIAN
SUPPLY CO., LTD. and H. T. MARSH.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED OCTOBER 6, 1902. DECIDED NOVEMBER 14, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

To sustain an action for breach of condition of attachment bond for the payment of damages, "in case the attachment shall be dissolved, by competent authority, before final judgment in such suit" it is necessary to prove by competent evidence that the attachment was dissolved before final judgment.

Such action cannot be maintained where the defendant in attachment paid the debt before final judgment.

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal on points of law from the judgment of the District Court of Honolulu. The point of law set out in the certificate of appeal is as follows:

"That the Second District Magistrate erred in granting Judgment of Non-suit upon the ground set forth in defendant's motion for non-suit: to wit, upon the ground that plaintiff has not shown that the attachment has been dissolved by competent authority before final judgment in such suit, and that said judgment of non-suit was and is contrary to the law and the evidence."

The action was for damages arising from the alleged breach of an attachment bond. The conditions of the bond provided that the obligation should be void, if the Hawaiian Supply Co. Ltd., should pay all costs and all damages sustained by the defendant by reason of the attachment, "in case the plaintiff should

not sustain its suit or in case the attachment should be dissolved, by competent authority, before final judgment in such suit."

The defendants, in the answer, admitted the levy of the attachment, the retention of the goods for 24 hours by the sheriff, the execution of the bond in suit and the payment of the debt claimed by the defendant in attachment. The plaintiff introduced evidence tending to prove damages resulting to him by reason of the attachment and also introduced in evidence the original summons issued in the attachment suit and the return indorsed thereon. This summons was returnable on 21st day of May, 1902, at 1:30 o'clock, p. m. The return was as follows: "By request of counsel in the within entitled cause, the property attached has been released after my expenses having been paid, also the service of the copy of the within said cause has not been made." This was signed by a deputy sheriff and dated May 21, 1902.

There was no evidence offered to prove that the attachment suit had or had not proceeded to final judgment. It is argued for the appellant that the above return shows that the attachment was dissolved by competent authority before final judgment. It may be admitted that the return shows a dissolution of the attachment by competent authority on the return day of the summons, but it is not clear that it shows that this was before final judgment. The court might infer that it was, but where facts are susceptible of easy proof the court ought not to be left to inference to establish them. The burden was on the plaintiff to make out a *prima facie* case. The district magistrate in effect held that he failed to do this. But, however that may be, the plaintiff could not recover in this action for the reason that his own act, the payment of the debt, rendered it unnecessary to proceed to final judgment in the attachment suit. That the action did not proceed to final judgment was through no fault of the plaintiff in attachment or any defect in the proceedings.

It could not have been contemplated by the legislature, as contended by the plaintiff, that, after the goods had been seized

under the writ, the defendant could pay the amount of the debt and costs, securing the discharge of the attachment and settlement of the suit, and then maintain an action on the attachment bond. Such a construction of the bond cannot be upheld. The attachment is an ancillary proceeding in aid of and dependent upon the suit for debt. When the debt was paid there was nothing further to sustain the attachment. The payment of the debt before judgment by the defendant was an acknowledgment of the justness of the claim if it was not also a confession of the truth of the facts alleged as grounds for the attachment.

The appeal is dismissed.

Thayer & Hemenway for plaintiff.

W. L. Whitney for defendant.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON and ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE P. BISHOP, deceased, v. THE TERRITORY OF HAWAII.

SAMUEL M. DAMON v. THE TERRITORY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 7, 1902. DECIDED NOVEMBER 15, 1902.

GALBRAITH, J., JOHN T. DE BOLT, CIRCUIT JUDGE, IN PLACE OF FREAR, C.J., DISQUALIFIED, AND W. J. ROBINSON, CIRCUIT JUDGE, IN PLACE OF PERRY, J., DISQUALIFIED.

The Hawaiian statutes giving konohikis, or landlords, special privileges in the sea fisheries adjoining their land were not grants of prop-

erty or covenants in the nature of grants but were public statutes in which no one could acquire a vested right.

The phrase "private property" used in these statutes denoted no more than the special rights, or privileges, given by the law over the sea fishery.

When the statutes were repealed by the Organic Act the konohiki, or landlord, no longer had any "private property" in such fishery. Exclusive rights in a sea fishery surrounding these islands could not be acquired by prescription or ancient custom.

The konohiki's, or landlord's, "private property" in the sea fishery could not pass as an appurtenance to the land.

A Royal Patent containing, after the description of the land conveyed and before the habendum clause, a recital that "there is also attached to this land a fishery right in the sea adjoining" without express words of grant referring to the fishery does not convey any right in the fishery.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiffs commenced these actions under Section 96 of the Organic Act for the purpose of establishing an exclusive right to the fisheries of Waialae-iki and Moanalua, Island of Oahu.

In the first case the plaintiffs as trustees of the Bishop Estate, claim a vested right as sole and exclusive owners in fee simple of the sea fishery, same not being a pond or artificial enclosure, situated within the reef adjoining the land of Waialae-iki, setting out a description by metes and bounds; and further allege in their petition that plaintiffs' claim consists of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds described, one species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit, upon consultation with the tenants of their land, all fishing within such fishery during certain months of the year; and during the fishing season to exact from each fisherman one third of all the fish taken upon said fishing ground;

that from time immemorial the plaintiffs and their grantors by ancient custom and prescription have had an exclusive fishery within the bounds set out, subject only to the rights of tenants on the land of Waialae-iki; that the said fishery was originally appurtenant to the land of Waialae-iki awarded to A. Paki by Apana 3 of Land Commission Award No. 10,613 and confirmed by Royal Patent No. 3578; and that plaintiffs claim an absolute estate in fee simple in said fishery by purchase under various mesne conveyances.

In the second case the plaintiff makes a similar claim to the fishery situated at Moanalua and also sets up an additional ground for the claim of right, i. e., that the said fishery was confirmed to L. Kamehameha by Royal Patent No. 7858 under whom the plaintiff claims an absolute estate in fee simple in said fishery by purchase through various mesne conveyances and by descent.

The cases were tried to a jury in the Circuit Court. In the first the Judge granted defendant's motion for non-suit at the close of plaintiff's evidence. In the second a verdict was directed for the defendant. The plaintiffs excepted and come to this court on bills of exceptions. The cases were argued and submitted together.

In the first case the claim of plaintiffs is based on three grounds, to-wit: (1) That the right claimed is an appurtenance to their land; (2) that it is based on prescription or (3) on Ancient Hawaiian custom while in the second case these three grounds are relied on and an additional claim for the right is made i. e., a grant from the King.

It is contended on behalf of the Territory, and the ruling of the Circuit Judge seems to have been based on this theory, that in the second case the Patent for the land of Moanalua does not grant the fishery to the patentee and in both cases that the plaintiffs did not and could not acquire an exclusive right in the fisheries by prescription or by ancient custom, and that whatever right they enjoyed in the fisheries on June 14th, 1900, the time of taking effect of the Organic Act, was derived from the Hawaiian Statutes on the subject of fisheries and that these were

public statutes or laws unde which no one could acquire a vested right and that when the statutes were repealed all of the rights and privileges of the plaintiffs in the said fisheries were abrogated and annulled.

The provisions of the Organic Act on the subject are as follows, "Section 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided."

Section 96. "That any person who claims a private right to any fishery shall, within two years after the taking effect of this Act, file his petition in a Circuit Court of the Territory of Hawaii, setting forth his claim to such fishing rights, service of which petition shall be made upon the Attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established, the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the Treasury of the Territory of Hawaii not otherwise appropriated."

The question of greatest difficulty presented by these cases is to determine whether or not the rights of the plaintiffs in the respective fisheries were properly "vested rights" within the saving clause of Section 95, of the Organic Act.

By the Common law the title and dominion of the sea and navigable rivers and arms of the sea within the Territorial jurisdiction were in the King who held the same in trust for his subjects who had a common right of navigation and fishery therein.

This jurisdiction was held to extend one marine league from the beach at low water mark. 2 Blackstone 52; Gould on Waters, Sec. 3; *Rogers v. Jones*, 1 Wend. 237 at 256; *Shively v. Bowlby*, 152 U. S. 1; *The King v. Parish*, 1 Haw. 58.

Although the claim to an exclusive right in a sea fishery has been the subject of much litigation and of conflicting decisions the weight of authority seems to hold that at common law such a right might be acquired by grant or by prescription which presumes a grant. Gould on Waters, Sec. 189, and cases cited in note: *Rogers v. Jones*, *supra*:

The Supreme Court of New York has held that by the common law the King had the right to grant the soil under navigable water, and with it the exclusive right of fishery. *Brookhaven v. Strong*, 60 N. Y. 56. A grant made by a Colonial Governor and confirmed by Act of Assembly was held to vest the title to an exclusive fishery in the grantee. *Robins v. Acherly*, 91 N. Y. 98. The holding of the New York Courts on this question was followed by the Supreme Court of the United States in *Lowndes v. Huntington*, 153 U. S. 1.

It is said by Woodworth, J., in case of *Rogers v. Jones*, *supra*, "It is well known that numerous grants have been made from time to time by the Commissioners of the land office of lands under the waters of the Hudson, all which have proceeded on the ground that it was the undeniable right of the people of this state to make such grants. Until very lately, I have not understood that the power was questioned. It is here proper to observe that this principle does not at all conflict with the doctrine laid down by writers on national law, who declare the air, running water, the sea, etc., are common property (Vattel, b. 1. Ch. 23, Sec. 280, 287. Grotius, b. 2 Ch. Sec. 3.) The same writers, however, admit that the various uses of the sea near its coast render it very susceptible of property; and rivers are susceptible of property, because confined in banks; such places may be appropriated by the people to whom they belong and the productions within reach, in the same manner as the land they inhabit." p. 156.

Kamehameha III, who ruled the Hawaiian Islands before there was any written laws or Constitution, as well as after the adoption of a written Constitution, was in the fullness of the common law phrase "the universal lord and original proprietor of all lands in his kingdom." He was the source of title. He could give and take from. His will was law. None of his people held allodial titles prior to 1840. There is little, if any, doubt that he had the power to grant exclusive fisheries to any of his subjects if he desired to do so. (*Territory v. Liliuokalani*, ante 88. *Brown v. Spreckels*, ante, 400), although there is a declaration by Chief Justice Judd that tends strongly to indicate that this Court at that time (1899) held to the contrary view. "The people of Hawaii," said the Chief Justice, "hold the absolute rights to all its navigable waters and the soil under them for their own common use. See *Martin v. Waddell*, 14 Pet. 410. The lands under navigable waters in and around the Territory of the Hawaiian Government are held in trust for the public use of navigation. *Stockton v. Baltimore & N. Y. R. R.*, 32 F. 9." *King v. Oahu Railway & Land Co.*, 11 Haw. 725.

Admitting that the plaintiffs might have obtained the right claimed by grant the question arises. Did they acquire such right? Such a grant would be against the public right and under the well established rule of construction requiring all such grants to be construed most strongly against the grantee it follows that such right if it exists must appear by express terms of the grant.

Much was said at the hearing and in the briefs relative to these islands surrounded by the sea, teeming with food for the inhabitants, and of the relative importance of the products of the sea to the life of the people over those of the land. All this was and is of much interest but it does not appear how it in any material way leads to a solution of the issues presented. Since it appears that whatever the customs may have been or the rights and privileges enjoyed by the chiefs, nobles and common people in the fisheries prior to the year 1839, at that

time they were all revoked and cancelled, and a statute passed to regulate and govern them.

The first written law on the subject of fisheries in these islands was adopted by the king, nobles and chiefs on the 7th day of June, 1839. In this statute it is declared that,

“His Majesty the King hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords, and a portion he reserves to himself.” And further that,

“These are the fishing grounds which His Majesty the King takes and gives to the people: The fishing grounds without the coral reef, viz: the Kilohee grounds, the Lohee grounds, the Malolo grounds, together with ocean beyond.

“But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands but not for others.”

An examination of this Act (Chap. 3, Laws of 1839) will show that it was intended to govern the subject of fisheries completely. Experience demonstrated that it was incomplete and various amendments were adopted on April 1st, 1841. Again in 1845 another act was passed on the subject more clearly defining the rights of the several parties. Section 1 of this last Act defines the fishing ground of the people to be “the entire marine space without and seaward of the reef upon the coast of the several islands,” etc. Section 2 of this act reads, “The fishing grounds from the reefs, and where there happens to be no reefs from the distance of one geographical mile seaward to the beach at low water mark, shall in like manner be considered private property of the landlord whose lands by ancient regulation belong to the same; in the possession of which private fisheries the said landlords shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth.

“Sec. 3. The landlord shall be considered in like manner to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed.”

The other sections give the landlords the right each year to

set apart for themselves one specie or variety of fish natural to the fishery and to give public notice of this fact by proclamation, etc., and fixing penalties against landlord and tenant for violation of the Act. Also defines the species of fish designated as the royal fish and prescribes that these shall appertain to the government and for a division of them between the king and the fishermen, and makes extensive provisions relative to the "king's tabu," etc.; providing for the appointment of fishery agents to "exact and receive of all fishermen for the use of the royal exchequer during the legalized fishing seasons the one-half part or portion of all protected fish taken without the reefs," etc.

Time and experience demonstrated to the satisfaction of the King that it was not profitable for the government to engage in the fishing business, so on July 11, 1851, the King approved an act granting to the people the rights of piscary belonging to the government. The second section of this Act reads: Sec. 2. "All fishing grounds pertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds the minister of the interior may tabu the taking of fish thereon at certain seasons of the year."

Another Act was passed the same year, (1851), entitled "An Act to protect the people in certain fishing grounds," and reads in part as follows: "Section 1. That no person who has bought or who may hereafter buy any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom over any fishing grounds not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior.

"Section 2. If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been or may be given to the people, such fish shall not be tabooed them. It shall only be tabooed when caught within the bounds of the

konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other."

The Civil Code of 1859 embraced all the laws then in force in the islands on the subject of fisheries. Section 384 of the Civil Code is a verbatim copy of Sec. 2 of the Act of 1851, above quoted, and Sec. 387 is a copy of Sec. 2 of the Act of 1845 except the word "konohiki" is substituted for the word "landlord" used in the original enactment. The other sections hereinbefore quoted were included in this chapter of the Civil Code. All of these laws without material change were carried forward and are published as Chapter 84 of the Penal Laws of 1897. These statutes on the subject of fisheries had been in force some of them for more than half a century and all of them for most of that time, when repealed by Sec. 95 of the Organic Act, June 14, 1900.

It is clear from a review of these statutes that the following are necessary inferences, to-wit, that the plaintiffs cannot base any claim to the fisheries on ancient custom or prescription; that no right that they may have possessed can antedate the Act of 1839; that all right in the fisheries of whatever nature that had been enjoyed by any subject prior to that date was revoked and annulled by said Act and that all claims must now date from the Act of 1839 or from some subsequent date.

There are only two grounds remaining on which the plaintiffs might sustain their claim, to-wit: (1) that it is based on grant or (2) was an appurtenance to the land.

It is argued that these statutes are in the nature of grants and are sufficient to vest title to the fisheries in the landlords and that the word "give" used in the Act of 1839, is a word of conveyance and was sufficient to pass title to the fisheries from the king to the konohiki and that the title so conveyed become a vested right within the meaning and intent of Sec. 95 of the Organic Act.

We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes them-

selves bear conclusive evidence that they were not intended as grants of property and that they were not intended to be more than appears from their plain terms, to-wit, grants of special privileges to persons who then were or might thereafter become landlords.

The statute of 1851 granting to the people certain rights of piscary shows a clear intent to make a grant both in the title and body of the law. Words of grant are used. "All fishing grounds," etc, "shall be and are hereby forever granted." If it had been the intention to convey an absolute right of property to the landlords by the other statutes, it seems that suitable words of grant would have been employed. That such words were not used can only be explained on the theory that a grant was not intended, and we so construe the statutes.

It is contended that the fishery was an appurtenance to the land and passed by deed or patent without special reference thereto in the conveyance.

The statute declares the fisheries within the reefs and for one mile from shore where there is no reef to be the "private property" of the konohiki or landlord. We understand the word *property* to be used in this statute in a general sense, meaning dominion over a thing. (1 Blackstone, 122; 2 *id.* 1.) "The word 'property' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, means only the *rights* of the owner in relation to it. It denotes a right over a determinate thing." Andrew's Am. Law, Sec. 96.

The phrase "private property" used in the law cannot mean more than the rights which the statute gave to the konohiki or landlord over the fishery and such private property could not be said to be held by contract or any covenant in the nature of a contract.

A parallel is sought to be drawn between the fishery statutes and the United States statutes permitting settlers to take up homes on the public domain. The analogy is not apparent. There is a wide distinction between the statutes and the rights that may be acquired under them. The United States home-

stead statute is not self-executing nor is it a grant of land to the homesteader. It provides a method by which a qualified person who complies with the terms prescribed may acquire title to land. The title passes from the government to the homesteader when the patent issues and not before. *Shiver v. The United States*, 159 U. S. 491. Again the one statute relates to land that may be possessed, occupied, cultivated and improved with buildings and structures while the other relates to water, not water passing with the soil under it or confined within bounds but water in the open sea, changing with the rising and ebbing of the tide; it gave no right to the land under the water and no right to place any structure or improvement thereon, not even to anchor a house-boat, but a privilege to take fish from this area of water, if caught while there, a mere theoretical species of property at best.

If the "private property" possessed by the kouohiki in the fishery was only the right given by the statute then it follows that when the statute was repealed there was no further claim of "private property" in the fishery, because that which gave the right or "private property" was no longer in existence. In this view and, we take it to be the correct view, the plaintiffs could acquire no vested right in the fishery. While the statutes were in force plaintiffs private property in the fishery was protected but when they were repealed there was no property in the *res*. These statutes were general laws. "Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by change in the law." Cooley, Const. Lim., p. 343.

Again the same author says:

"In organized society every man holds all he possesses and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and sta-

bility of private possessions, and strengthen or destroy well founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense." Cooley, p. 437. * * *

"All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they became divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." *Id.* p. 438.

This view is in perfect harmony with the contemporaneous construction placed on these statutes in the leading case on the subject in this court, *Haalelea v. Montgomery*, 2 Haw. 62. In that case Mr. Justice Robertson said that the landlord "could have transferred the fishery, or her right therein, only by an express grant, *eo nomine*. Had she made a deed of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee." p. 70.

* * * * *

And again, "If any person who has acquired a kuleana on the Ahupuaa of Honouliuli should sell and convey his land, or even a part of it to another, a common right of piscary would pass to the grantee as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance, it would pass as an incident. Here, we think, is the great distinction between the rights of the konohiki and those of the tenants or occupants, for while the former holds the fishery as his private property the latter has only a right of piscary therein as an incident of his tenancy." *Id.* p. 71. Here it is declared that the konohiki's or landlord's rights in the fishery are private property and as such could not pass as an appurtenance to the land; that in order to convey it specific words of grant must be used in the conveyance for that purpose.

This decision was rendered in 1858, one year before the adoption of the Civil Code and its correctness, so far as we are advised, is now questioned for the first time. It is contended that this part of the decision is mere *dicta* and was not involved in a decision of the issues in that case. Even if this be true it does not appear how that fact would weaken the declaration as a correct interpretation of the theory of the law on which fishery rights in these islands are based. The decision was by Mr. Justice Robertson, whom the late Chief Justice Judd declared to be "our best authority" on early Hawaiian tradition, history and jurisprudence. It appears to have been accepted by the bench and bar of the islands as a correct declaration of law of the question for most half a century and no sufficient reason has been advanced to warrant us in questioning its correctness at this time.

This construction of the statute is further supported by the fact that the Land Commission although given authority to award "rights of piscary" by the statute creating it, (Statute Laws, vols. I and II, Sec. 7, p. 109), refused to award fisheries either as "rights or territory," except in a very few instances, leaving the parties to their rights under the general statutes." *Akeni v. Wong Ka Mau*, 5 Haw. 91. It is also confirmed by the language found in the first section of the Act of May 24, 1851, passed to protect the people in certain fishing grounds forbidding anyone who had acquired government land from exercising exclusive rights "over any fishing ground *not included in his title*, although adjacent to said lands." This inhibition was carried forward into the Civil Code of 1859 as Sec. 393, and into the Penal Laws of 1897 as Sec. 1458.

We do not understand that any of the adjudicated cases in this jurisdiction are opposed to this theory.

It was held that the konohiki or landlord had no power to alienate a single right given by law to the tenant in a sea fishery. *Oni v. Meek*, 2 Haw. 87.

Also that although the Land Commission heard evidence relative to the boundaries of the fisheries claimed by the konohiki

and refused to award the fishery either as a right or territory and although the konohiki of the adjoining land was present at the hearing still he was not estopped from disputing the boundary of the sea fishery claimed to be shown by such evidence. *Akeni v. Wong Ka Mau*, 5 Haw. 91.

While in *Shipman v. Nawahi*, 5 Haw. 571, the fishery is spoken of as "adjoining and appurtenant to plaintiff's land called Waiakea," the action was for damages for trespass upon the fishery. Judgment was for the plaintiff in the Court below, but on appeal it appeared that the defendant had a kuleana in the land of Waiakea hence a right to fish and a new trial was ordered.

The case of *Judd v. Kuanalewa*, 6 Haw. 329, was an action of ejectment by one landlord against another for possession of a fishery. It was found that there had been a division of the fishery by the parties and judgment was rendered accordingly.

Hatton v. Piopio, 6 Haw. 334, was an action against a tenant for unlawfully catching and selling fish, it was held that "under our fishing laws every resident on a land has the right to fish in the sea appurtenant to the land and to sell the fish caught by him."

Shipman v. Com'rs. of Crown Lands, 6 Haw. 351, was a suit in equity by the plaintiff's lessees of a sea fishery seeking an injunction to restrain the defendant from trespassing and fishing. It was held that no irreparable damage was shown and that there was an adequate remedy at law both by an action of damages and also under the statute by criminal proceedings. Injunction refused.

These we understand to be the principal decisions of this court construing the fishery statutes. While in some of them the fishery is spoken of as being "appurtenant to the land" and as "an appurtenant of the land" still in no one of them does the court in the slightest degree detract from the force of the law announced in *Haalelea v. Montgomery* or attempt to overrule the law there declared that a sea fishery could not pass as an appurtenance to the land. As a matter of fact the fishing

rights were appurtenant to the land so long as the statutes were in force but when the statutes were repealed these appurtenances were such no longer.

"Fish in the open sea are animals *ferae naturae*, and go and come at will unrestrained." (*Hatton v. Piopio*, 6 Haw. 337) But when taken fish were private property and entitled to the protection of the law. It was entirely proper for the legislature to prescribe penalties for violation of the fishing statute and for the courts to entertain civil actions for damages for trespassing against the rights given by statute.

In the second case the claim of grant is based upon a clause in the patent for the land of Moanalua. It appears in the patent after the operating words of grant and the description of the land conveyed that there is a recital relative to the fishery as follows, to-wit: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows." Then a description of the fishery claimed in the petition is set out by metes and bounds. The habendum clause of the Patent reads in part "To have and to hold the above granted land, in fee simple, unto the said Lot Kamehameha," etc. The Patent was a grant of land. The operating words of grant are not enlarged by the habendum clause. The fishing right was not land or a necessary part thereof. The word "attached" cannot be construed as a word of grant or as showing an intention to convey. It does not appear from the Patent that it was the intention of the grantor to convey the fishery. The recital relative to the fishery may have been inserted for the purpose of making plain the boundaries of the fishery adjoining the land and in which the statute gave the landlord special privileges. The plaintiffs, it seems, took this view of the matter as the evidence shows that he exercised the right in the fishery under the statute.

Under the common law the right of fishing in the open sea like that of navigation was a public right. The grant of an exclusive right to a sea fishery cannot be presumed. Every presumption is against the grant and in favor of the public. Every ambiguity or doubt in the instrument by which the right is

claimed to be granted will be construed most strongly against the grantee.

Rapid Transit Co. v. Tram. Co., 13 Haw. 363, 371; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Fertilizer Co. v. Hyde Park*, 97 U. S. 659; *Newton v. Commissioners*, 100 U. S. 548. *Shivley v. Bowlby*, 152 U. S. 1.

Applying this well established rule of construction to the facts, we are bound to hold that the patent to the land of Moanalua did not grant the sea fishery adjoining.

Exceptions are overruled.

Hatch & Silliman for the plaintiff.

Cecil Brown and *Magoon & Peters* on brief.

Robertson & Wilder for defendant.

IN THE MATTER OF THE APPLICATION OF THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY FOR A WRIT OF MANDAMUS AGAINST F. W. MACFARLANE, F. J. TESTA, A. N. KEPOIKAI, J. G. PRATT and A. C. LOVEKIN, Commissioners of Fire Claims.

IN THE MATTER OF THE APPLICATION OF YIM JAN KANG, WONG HING CHOW, CHANG KEE, LEE CHU, CHUN YAN SING and CHING LUM, and LEE CHU, President, LOO CHIT SAM, Vice-President, and T. J. KING, Treasurer, of the Oahu Lumber and Building Company, Limited, Partners under the name of Sing Chan Company, for a Writ of Mandamus against F. W. MACFARLANE, F. J. TESTA, A. N. KEPOIKAI, J. G. PRATT and A. C. LOVEKIN, Commissioners of Fire Claims.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 8, 1902. DECIDED NOVEMBER 15, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Much property having been destroyed by fire in consequence of orders of the Board of Health, in suppressing bubonic plague, a special Commission was created by statute to adjudicate claims for the loss of such property. The Commission having heard certain claims presented by the owners and insurers respectively of certain property so destroyed, declined to award any sum to the insurers, and awarded to the owners the total loss less the amount paid by the insurers and stated that the balance so awarded was subject to assignments previously made to the insurers up to the amounts that had been paid by them. The owners and insurers

respectively then applied for writs of mandamus to compel the Commission to amend their awards so as to allow the total loss found either wholly to the owners subject to the assignments, or else part to the insurers and the remainder to the owners not subject to the assignments. Held,

The insurers had no valid independent claims of their own.

But, the contract of fire insurance being one of indemnity, an insurer against fire is, upon payment of the insurance, subrogated in a corresponding amount to the rights, if any, of the insured, against the one who caused the loss; and of course, the insurer may obtain rights by express assignment from the insured.

The statement, though unnecessary, in the award to the insured that it was subject to the rights of the insurance companies under the assignments made by the insured does not call for relief by mandamus.

Quere, whether the Commission should have awarded the total amount of the loss to the insured instead of deducting the amounts previously paid by the insurers.

But, *semble*, that, if the total amount should have been awarded, the award as made cannot be corrected by mandamus.

Even if the remedy by mandamus were as ample under our statute as the remedy is usually elsewhere by certiorari, still the award, having been made by the Commission acting within its jurisdiction, cannot be reviewed and corrected, since the statute makes it final and not subject to appeal.

It was competent for the legislature to provide that the awards of a special Commission of this kind created for adjudicating claims against the government should be final.

OPINION OF THE COURT BY FREAR, C.J.

These applications for writs of mandamus to compel the Commissioners of Fire Claims to amend their awards in certain cases, were heard together both in the lower court and in this court on appeal.

Much property having been destroyed in the city of Honolulu during December, 1899, and January, 1900, under or in consequence of orders of the Board of Health in suppressing bubonic plague, provision was made by Act 15 of the Laws of

1901 for the appointment of a Commission to hear and determine claims for damages for such loss of property and for the payment thereof to the amount of \$1,500,000. The respondents are the Commissioners appointed under that Act. They have, we understand, practically completed their labors, that is to say, have heard and decided all of the nearly 7,000 claims that were presented to them but their functions have not ceased by limitation of law.

The petitioners in the second case, Sing Chan Company, presented a claim for \$11,816.92 for property so destroyed, and the petitioner in the first case, the insurance company, presented a claim for \$1,500 as assignee of the Sing Chan Company claim up to that amount, the insurance company having obtained the assignment upon paying Sing Chan Company that amount under a policy of insurance upon that property.

The Commission, after hearing the claims, found that the value of the property destroyed was \$7,877.95, but awarded the Sing Chan Company only \$4,590.85, being the total loss found, less amounts previously paid under three insurance policies on the property, and upon the award the following was noted: "This claimant having subrogated to the following insurance companies, to-wit, Liverpool & London & Globe Insurance Co., Policy 354,106, \$1,500; Fireman's Fund Insurance Co., Policy 627,873, \$1,000.00; Royal Insurance Co., Policy 5,853,660, \$787.10; this award is hereby made subject to the subrogation of this claimant to said companies. Less and subject to any sum or sums of money hereafter recovered or received from insurance companies on account of property destroyed by or incidental to said sanitary fires." Upon the award in the case of the insurance company the following was noted: No award made under Act 15 of Session Laws of 1901. Award made to claim 4346 (Sing Chan Company) subject to subrogation; or words substantially to that effect. The other two insurance companies likewise presented their claims to the Commission—with presumably similar results, though it is not expressly so stated.

The Circuit Judge, after a hearing on demurrer in each case,

granted peremptory writs of mandamus directing the Commission to amend its awards so as to allow the insurance company the amount of its assignment, \$1,500, and the Sing Chan Company, \$4,590.85 without lien or subrogation. The respondents appealed.

The insurance company does not rely upon an independent cause of action of its own or a claim for damages caused to it by the orders of the Board of Health. It could not, for such damages would be too remote under the general law (see *Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265, 274) even if the Territory were suable in tort in the regular courts, which is not the case (*Coffield v. Territory*, 13 Haw. 478), and the statute in question (Section 7) expressly prohibits awards for "consequential damage" and limits allowable damages to loss "for the destruction of or direct damage to property."

Nor does the insurance company rely on a right of subrogation independent of the express assignment, although (fire insurance being, like marine insurance, a contract of indemnity, and not, like life insurance, a contract to pay a definite sum upon the happening of a particular event) the company upon paying the insurance would, in the absence of an express assignment, be subrogated, in a corresponding amount, to the insured's right, if any, against the wrongdoer responsible for the loss. *St. Louis &c. R'y. v. Commercial Ins. Co.*, 139 U. S. 223, 235; *Darrell v. Tibbetts*, L. R. 5 Q. B. D. 560.

The company relies entirely on the express assignment, that is, upon its rights as an assignee of a portion of the claim of the insured.

The claim on behalf of the insurer was disallowed in both cases, and, therefore, in view of our conclusion that we cannot in proceedings of this kind review and correct the decision of the Commission upon this point, assuming it to be erroneous, it will be sufficient for the disposition of both cases if we state our reasons in the case of the owners alone.

We take it that the petitioners would be satisfied with either

an award to the insured of the total loss less the amounts paid by the insurers, provided the latter amounts were awarded to the insurers; or an award of the total loss to the insured subject to the assignments to the insurers, provided no awards were made directly to the latter, in other words, that the petitioners do not expect several awards exceeding in the aggregate the total loss, although they so prayed both before the Commission and before the Circuit Judge. Accordingly there can be no serious objection to the note made on the award to the owners, Sing Chan Company, to the effect that that award was subject to the assignments to the insurance companies. The serious objection to that award, from the standpoint of the petitioners, is that it was not for the full amount of the loss, not that it was subject to the assignments. No doubt it was unnecessary for the Commission to note that the award was subject to the assignments and it might have been better not to have done so, for the insured and insurers could settle their claims as against each other between themselves; and the Commission was authorized under the statute to make awards for "direct damage to property" and not to adjudicate conflicting claims to the amounts awarded.

As already stated the real question of importance to the petitioners, is whether the award to Sing Chan Company should have been for the full loss, \$7,877.95, or was properly made for that amount less the amounts paid by the insurers. But we need not undertake to decide this question, inasmuch as, in our opinion, set forth below, this court could not properly in a proceeding of this kind review and correct the action of the Commission even if it erred in its decision of this question. And yet we may be justified in stating some of the considerations that bear upon the question, partly for the purpose of throwing light upon it, especially in view of the arguments pro and con presented by counsel, and partly for the purpose of showing to some extent that the question is one of such a nature that it should not be decided in a proceeding of this kind.

Of course, if the statute clearly showed that the legislature

intended that the amounts paid by insurance companies should be deducted, that would end the matter; for, since the government cannot be sued at all without its consent, it may consent to be sued or to allow claims to be presented or awarded against it to only such extent as it pleases. The only reference to insurance in the statute is found in the provision in Section 9 that the claimant should state, among other things, "the amount for which the property was insured, the name of the insurer, and how much was paid thereon." The insertion of this provision can be accounted for on several theories. If the legislature intended by it that amounts paid by insurers should be deducted from owners' claims, it did not clearly express its intention.

Assuming that the question is not settled by the statute, its solution might depend upon whether the owners would be obliged as matter of law to reimburse the insurance companies out of the amounts received under the award of the Commission. If they would, then justice would seem to require that the full amount of the loss without deducting the insurance should be awarded; for otherwise the amounts of insurance would be in effect deducted twice and the owners would not be fully compensated for their loss. They would be discriminated against as compared with others and would better not have had insurance. And the general rule is that in actions by the owner against those who caused the loss, the measure of damages is the entire loss without deduction of amounts previously received from insurers. *Weber v. Morris &c. R. R. Co.*, 35 N. J. L. 402; see also *Pentz v. Receiver's*, 3 Edw. Ch. 341; 9 Paige 568. But if the owners would not as matter of law be bound to reimburse the insurers, it could be argued with a good deal of force that they could not justly complain if the amounts already received by them from the insurers were deducted, for they would be fully compensated—in part by the insurers and as to the rest by the government.

It would be under the express assignments or because of the nature of the contract of insurance as one of indemnity that the

owners would have to reimburse the insurers, if at all. As to the assignments, if the owners made those voluntarily, whether for a consideration or not, that was their own affair and the government could not be expected to take such assignments into consideration any more than if they had been made to any others than the insurers. The owners could not enlarge the government's liability by their own voluntary acts. And there is no showing in this case that they were obliged by the terms of their policies to make such assignments. As to the obligation, if any, of the owners to reimburse the insurers because of the nature of the contract as one of indemnity,—if there was no legal liability on the part of the government, as, for instance, if the orders of the Board of Health in consequence of which the fires occurred were legal under the circumstances or if the loss of property in question was not the proximate result of those orders, the owners would have no legal right as against the government (apart from the question of the right to sue the government) and therefore the insurers could have no rights by way of subrogation. But, of course, we could not properly in this proceeding go into the questions of proximate cause or of the legality of the orders of the Board of Health, even if the facts were before us. And the government has never so far as we are aware acknowledged a legal liability. It has apparently proceeded on the theory that the claims provided for were morally, if not legally, good and that it was only right that the public, for whose benefit the losses were incurred, should share them with the immediate sufferers. But, even if the insurers had no rights of subrogation based on the liability of the government, still, if the government should in fact compensate the owners, even though gratuitously on the theory of a moral obligation or by way of compromise or otherwise, might not the contract of insurance as one of indemnity give the insurers a right to reimbursement by the owners? And yet, if that would be so in case the owners were paid in full, would it be so in case the government, acting gratuitously, compensated the owners in part only, expressly disallowing the amounts paid by the insurers, so

that the owners would be no more than fully compensated by the government and the insurers together? Enough has been said to show that nice questions of law are involved and perhaps of fact and that we should have to decide some of these and practically entertain an appeal from the Commission in order to correct their award in the manner desired.

Assuming that the Commissioners erred in their views on these questions and that the award should have been for the full amount without deducting the insurance, can we at all, or at least by mandamus, review and correct their award, or must not the petitioners be left to pursue some other remedy, if any, in the courts or their remedies of persuading, if possible, the Commission or the legislature to grant the desired relief?

It is conceded that ordinarily certiorari would be the proper remedy to correct a judgment or award in a case of this kind, but it is contended that our statute (Civ. L., Sec. 1614) limits the scope of that remedy to such an extent as to make it inapplicable to this case and (*Id.*, Sec. 1600 *et seq.*) enlarges the scope of the remedy by mandamus so as to make it applicable. We need not express an opinion upon the scope of the statute in these respects. But it may not be out of place to remark that this court has in a number of cases followed the rule that prevails in most jurisdictions, that, although an inferior court may be compelled to hear and decide a matter, it cannot be compelled by mandamus to decide it in a particular way. And the mere fact that there is no other remedy is not sufficient to justify the court in proceeding by mandamus. *Ex parte Newman*, 14 Wall 152; *In re Rice*, 155 U. S. 396. It is contended, however, that it is sought here, not to control the Commission in the exercise of its judicial functions, but merely to compel it to enter an award in accordance with its own findings of fact. That was the contention in *Ex parte Morgan*, 114 U. S. 174, but the court held it not a proper case for mandamus. The Commission has already acted in these cases. We are asked, not to compel it to act or even to correct mere clerical mistakes or oversights, but to come

to a different conclusion or to make an award different from what they deliberately decided upon.

In our opinion the statute under which the Commission acted made its decisions final and not subject to review by the courts. The courts might interfere if the Commission declined to hear and decide a claim that was properly presented to it or if it attempted to act beyond its jurisdiction, but they cannot review and correct its awards made within the scope of its jurisdiction. The statute (Section 6) provides that, "its judgments shall be final and no appeal lie therefrom." The Circuit Judge held that if this provision were to be so construed it would be unconstitutional or rather contrary to the provisions of the Organic Act creating the judicial system of the Territory,—on the theory that the legislature could not create an inferior court of final jurisdiction. It is evident that, if that were the rule as to ordinary courts and cases, it would have no application to a special Commission in the nature of an auditing board, created to adjudicate claims against the government. *Peacock v. Republic*, 11 Haw. 404, 409. "The government cannot be sued except by its own consent, and if it consents to be sued at all, it may do so upon such terms and conditions as it pleases." Counsel for the petitioners did not in the lower court and do not now rely much, if they do at all, on this ground upon which the Circuit Judge based his opinion. Their contention is that by the established principles of the common law the courts have jurisdiction to review the judgments of inferior tribunals by certiorari or mandamus where no appeal or writ of error lies.

Words similar, at least in part, to those in question have been construed differently by different courts. For instance, in *People v. Betts*, 55 N. Y. 600, the court held that the statute in declaring that a certain appraisal should be "final and conclusive" meant, not merely that there should be no appeal technically speaking but that there should be no remedy at all by way of review and that therefore certiorari did not lie. See also *Commonwealth v. Justice*, 34 Pa. St. 156; *Auditorial Board v. Arles*, 15 Tex. 72; *Wertheimer v. Boonville*, 29 Mo.

254; *State v. Asylum St. Bridge Co.*, 63 Conn. 91. But it must be conceded that there are decisions or at least dicta tending to support the view that ordinarily such words alone are not sufficient to show an intention on the part of the legislature to preclude resort to the extraordinary writs, the presumption being strongly against such a construction. See, for example, *Rex v. Moreley*, 2 Burr. 1040; *Pcople v. Canal Board*, 7 Lans. 220; *State v. Quaiife*, 23 N. J. L. 89; *State v. Thayer*, 74 Wis. 48.

The circumstances here are different from what they were in most of the last above cited cases. Here, besides the provision that the judgments of the Commission shall be "final," there is also the provision that "no appeal (shall) lie therefrom." The word "appeal" here is not used in its technical sense. It is used in its broader sense as meaning a proceeding for reviewing and correcting the judgment of an inferior tribunal. The subject matter and language of the statute as a whole indicate an intention to avoid the formalities and delays of ordinary judicial proceedings and to have the claims adjusted by the application of horse-sense rather than of strict rules of law. Only one member of the Commission was required to be an attorney at law (Section 1), the judgments were to be final (Section 6), claims might be compromised (Section 12), issue need not be joined (*Id.*), "the Commission shall not be bound to follow the rules of the common law in relation to pleadings, practice, and the admission and rejection of evidence but shall exercise its discretion therein with the view of doing justice" (Section 15), apparently claims were expected to be presented and heard at the rate of about a thousand a month as there were nearly 7,000 claims and appropriations for the expenses of the Commission were made for only six months (Section 16). It could hardly have been contemplated that this large number of claims might possibly be brought into the regular courts by mandamus or other proceedings to correct alleged errors. Then, again, the statute was not intended to provide for the adjudication of rights as between individuals or even for the adjudication of strictly legal rights

as between the government and individuals. Under such circumstances the statute making the awards final and not subject to appeal should not be construed as strictly as might otherwise be required. In *Commonwealth v. Justice, supra*, the Supreme Court of Pennsylvania said: "We are of opinion that this court has no authority to review the order or decree of the Common Pleas, for it is expressly declared to be final and conclusive, and because the case is not such a judicial one as falls necessarily within the general jurisdiction or judicial power of this court. And we do not think that this court ought to have any power over such cases; for, properly speaking, they involve no judicial question. They have no relation to the preservation or enforcement of private rights; but only to the distribution of money belonging to the state, and which it bestows upon counties and persons according to such rules, and by means of such instrumentality as it pleases. It makes the judges of the Common Pleas the functionaries for its distribution, and their decree final, and therefore we must not interfere." In *Auditorial Board v. Arles, supra*, a case in which a board created to pass upon claims against the late Republic of Texas, refused to allow a claim for interest, the court said: "Again the board having acted on the claim, and the law not providing any remedy, a mandamus ought not to have issued. The most that could be claimed on a mandamus was, that the board should act on the claim; and the fact shown in the petition, that the claim had been acted upon by the board, was sufficient ground on which the application should have been refused by the court below. It is an admitted rule that the state can be sued only by its own permission, and then in the way it has consented to be so sued. To sustain the judgment in this case would be, in effect, to sustain a suit against the state without its consent.

"If injustice has been done by the board, in rejecting the claim of interest, the claimant must rely for remedy upon the sense of the justice of the claim that the legislature may entertain on it."

The order of the Circuit Judge directing the Commission to amend its award is reversed in each case.

Hatch & Silliman and *F. W. Milverton* for petitioners.

Attorney-General E. P. Dole and *Deputy Attorney-General J. W. Cathcart* for respondents.

CONCURRING OPINION OF PERRY, J.

I concur in the conclusion of the majority that the statute under which the Commission acted made its decisions final and not subject to review, by any method, by the courts and that this provision is not unconstitutional, and also in the reasoning in support of that conclusion. The proceedings in these two cases are but attempts to obtain a consideration by this Court of certain errors of law alleged to have been committed by the Commission and a reversal or modification of its judgments, and the orders appealed from must, therefore, be reversed and the petitions dismissed.

It is unnecessary, I think, to express an opinion upon or to enter into a discussion of any of the other questions touched upon in argument or in the opinion of the majority.

JOHN WALKER v. FRANCES T. BICKERTON.

ORIGINAL.

SUBMITTED OCTOBER 31, 1902. DECIDED NOVEMBER 17, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is not necessary to obtain an order in equity for the execution of an ordinary power of sale given to a life tenant under a will; Nor to set forth in the deed the facts that make the sale necessary or

advisable where by the will the sale is authorized in case it is necessary or advisable.

Under the circumstances of this case as set forth in the opinion, the life tenant is held to be the sole judge of the advisability of selling.

OPINION OF THE COURT BY FREAR, C.J.

This is a submission on agreed facts. The question is whether the defendant in making a conveyance to the plaintiff effected a valid execution of a power to sell under the will of her late husband, Richard F. Bickerton. By the terms of the will, after giving certain real and personal property to his wife absolutely and in fee, the testator gave the residue both real and personal (the latter consisting of stocks in four sugar plantations) to his wife for life with remainder to his four children. He further provided as follows:

"If circumstances should make it necessary or advisable to sell any and all of the property real or personal in which my said wife has a life estate, then I give to my said wife, full power to make and complete such sale or sales, the proceeds, to be at once invested in some good security and become part of my estate; my wife nevertheless to enjoy the income from the same during her natural life. PROVIDED: that if it shall become necessary for the support of my said wife and children then my said wife may in her discretion retain a sufficient amount out of such principal for that purpose."

On April 18, 1899, the defendant executed a deed purporting to convey to the plaintiff a portion of the said real estate devised to her for life, namely, a portion of the tract bounded on three sides by King, Piikoi and Young Streets in Honolulu. There being some doubt as to the formalities of the deed, she executed another and more carefully drawn deed of the same land to the same party on October 25, 1902.

Four questions are propounded, in substance as follows: (1) Did the plaintiff acquire a fee simple title under either deed; (2) Was it necessary to apply to a court of equity for an order of sale; (3) was it necessary to set forth in the deed the facts of the

necessity or advisability of selling; and (4) was the defendant sole judge of such necessity or advisability? It is agreed that the judgment may be entered for the defendant if the plaintiff has a clear fee simple title, otherwise for the plaintiff.

The will clearly confers upon the life tenant the power to sell in fee simple, and the second deed is clearly in form a sufficient execution of that power. Assuming then that the testator had a good title in fee as agreed in the submission, the plaintiff received a good title in fee, unless the exercise of the power was dependant upon a condition which has not happened. There was no need of an order of sale in equity, nor was it necessary to set forth in the deed any facts to show the necessity or advisability of the sale. The questions of importance are whether the power could be exercised only upon certain conditions and, if so, whether those conditions have happened, or, since the only conditions mentioned in the will are the "necessity" and "advisability" of the sale, whether the defendant was sole judge of such necessity or advisability. If she was not, then the remaindermen might have the sale set aside provided they could prove that the sale was not necessary or advisable.

What was the intention of the testator—as gathered from the whole will? If the exercise of the power were conditioned simply upon its necessity for the support and maintenance of the life tenant, its validity might depend upon the existence of such necessity in fact, and the life tenant might not be the sole judge of that fact. But here the condition is not of that kind. The sale may be made if "circumstances" of any sort make it necessary or "advisable." This last word imports discretion. Again, a more liberal construction in favor of the exercise of the power should be given where, as here, the sale would not cut off the remaindermen but would merely change the form of the investment. The same is true also where, as here, the life tenant may under circumstances use a portion of the principal. It is evident also that the testator had complete confidence in the life tenant and intended to leave much to her discretion. She was the first object of his bounty. He appointed her sole ex-

ecutrix without bonds. He also said: "All matters concerning the welfare and interests of my said four children I leave entirely to the judgment and discretion of my said wife, feeling perfect confidence that she will act justly and wisely." In our opinion, considering the whole will, it was the testator's intention to make the defendant sole judge as to the advisability of selling. All that would be required of her would be that she should act in good faith—as to which no question is raised here. We have not seen any decided case precisely like this as respects the language of the will. But these principles have often been applied. See *Crozier v. Hoyt*, 97 Ill. 23; *Hall v. Preble*, 68 Me. 100.

Judgment for the defendant.

Plaintiff in person.

W. A. Whiting for defendant.

L. J. SUN v. JESSE MAKAINAI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 17, 1902. DECIDED DECEMBER 1, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Interest as damages for the breach of a contract should be computed from the date of the breach, that is, from the accrual of the right of action.

In an action of assumpsit, a Circuit Court, on an appeal from the District Court, is not authorized to allow attorney's commissions on the amount of the judgment originally recovered in the District Court, but only on the amount of the judgment awarded in such Circuit Court.

OPINION OF THE COURT BY PERRY, J.

Assumpsit for \$184.45 for labor performed and goods sold and delivered. The District Court of Honolulu, in which the action was commenced, gave judgment for plaintiff for \$79.45, attorney's commissions, \$7.94, and costs of court, \$3.55. On appeal, the Circuit Court of the First Circuit, jury waived, gave judgment for plaintiff for \$184.45, principal, \$17.70, interest thereon from December 30, 1900, \$7.94, "attorney's commissions allowed in the District Court," \$12.55 "attorney's commissions in this Court," and \$13.65, costs. Defendants excepts (a) to the allowance of interest from December 30, 1900, claiming that it should have been only from May 5, 1902, the date of the last payment on account by him, and (b) to the allowance of \$7.94 attorney's commissions for the District Court.

The claim that interest should have been calculated only from May 5, 1902, is based upon the provision of Section 1038 of the Civil Code of 1859, (Civil Laws, Section 1290) that "in all actions of debt, account, or assumpsit, brought to recover any balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued, from the time of the last item proved in such account." That section is part of the chapter relating to the time of commencing personal actions and was probably intended to apply only to that subject; but, however that may be and whatever in the absence of statute, may be the law in the case of mutual accounts, this is not such a case.

The bill of particulars in this case shows items of goods furnished and labor performed extending over the period from September 10, 1900, to November 30, 1901. Although the formal judgment purports to allow interest on the total principal from December 28, 1900, to September 30, 1902, the date of entry of judgment, the sum awarded, \$17.70, was in fact arrived at by computing interest on the amount of each of four bills rendered during that period and covering the goods sold and labor performed up to their respective dates, and then deducting from the total interest on each of the three partial payments made by

defendant. The general rule is that interest as damages for the breach of a contract should be computed from the date of the breach, or, in other words, from the accrual of the right of action. 16 Am. & Eng. Encycl. Law, 2nd ed., 1040, 1041. Whether or not it might have been allowed from an earlier date, interest in this case was properly allowed from the date of the rendering of each bill.

As to attorneys' commissions. The statute which applies, reads: "In all the Courts of this Territory, in all actions of assumpsit there shall be taxed as attorneys' fees, in addition to the attorneys' fees now taxable by law, to be paid by the losing party and to be included in the sum for which execution may issue, ten per cent on all sums to one hundred dollars, and two and one-half per cent in addition on all sums over one hundred dollars, to be computed on the excess over one hundred dollars. The above fee shall be assessed on the amount of the judgment obtained by the plaintiff and upon the amount sued for, if the defendant obtain judgment." The plaintiff contends that the words, "in all the courts of this Territory," authorize any court on appeal to award attorneys' commissions, not only upon the amount recovered in that court but also upon the amount recovered in the court or courts through which the case has already passed. We do not so construe the statute. While each court is authorized to tax attorneys' commissions, the amount of the award is specifically limited by the statute to the rate prescribed, "on the amount of the judgment obtained by the plaintiff" and is "to be included in the sum for which execution may issue." The only judgment that answers the description of the statute is that obtained in the Circuit Court. The District Court judgment was no longer in effect when the Circuit Court entered its judgment.

The order allowing attorneys' commissions for the District Court and the judgment are set aside and the cause is remanded to the Circuit Court for such further proceedings as may be necessary.

F. J. Russell for plaintiff.

Achi & Johnson for defendant.

FRANC R. WINSLOW *v.* HENRY E. WINSLOW.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 21, 1902. DECIDED DECEMBER 1, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Publication of summons in divorce cases when the libellee cannot be found may be made in certain classes of newspapers under Civ. L., Sec. 1153, notwithstanding the provision in an earlier statute (Civ. L., Sec. 1933) that such publication should be in certain named newspapers which no longer exist under such names.

OPINION OF THE COURT BY FREAR, C.J.

This is an exception to a refusal to order publication of summons in a divorce case after a return that the defendant could not be found. The grounds of the refusal were that the statute (Sec. 4, Ch. XVI, Laws of 1870; Civ. L., Sec. 1933) provided that in such cases the publication should be in the "Government Gazette and Ke Au Okoa," papers no longer published under such means, and that the statute should be strictly followed. The Circuit Judge at first ordered publication in the "Evening Bulletin" but afterwards revoked the order. An application was then made for an order of publication in the "Hawaiian Gazette" and "Kuokoa," and it was to the refusal to make that order that the exception was taken.

It is contended, among other things, that the "Hawaiian Gazette" and the "Kuokoa" are the successors of the papers mentioned in the statute and so are really the ones intended by the legislature, and also that the statute should be construed liberally and that therefore publication in any appropriate papers would be sufficient on the theory that publicity was the main object.

Whether these contentions are sound or not, need not be

decided, for the statute clearly authorizes service of summons by publication and, if it is ineffective at all, it is only because the particular newspapers named are no longer published, but this, if it is a defect, is remedied by another and later statute, which must be held to amend the statute in question in so far as the newspapers in which the publication may be made are concerned.

This later statute is Chapter XXXVI of the laws of 1892. It provides in substance in Section 1 (Civ. L., Sec. 1153) that whenever it shall be necessary to make any advertisement of any judicial proceeding, the party or his attorney, at whose instance the proceedings are brought, shall have the privilege of naming the newspaper or newspapers in which the advertisement shall be published, and that it shall be the duty of the clerk and judge to have the advertisement published in such newspapers, provided such papers are published in the appropriate languages and shall have been shown to and declared by the Supreme Court to be newspapers of general circulation. Section 2 repeals all conflicting laws. This statute applies here. The libellant's attorney named the papers in question. Those papers are in the appropriate languages and they have been shown to and declared by the Supreme Court to be newspapers of general circulation.

The exception is sustained, the ruling excepted to set aside and the case remitted to the Circuit Court for such further proceedings as may be proper consistently with the foregoing opinion.

W. R. Castle and *P. L. Weaver* for the libellant.

T. McCants Stewart, counsel in another similar case, by permission also argued in support of the exceptions.

No appearance contra.

HAWAII MILL COMPANY, LIMITED, v. ALFRED
ANDRADE.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED NOVEMBER 24, 1902. DECIDED DECEMBER 2, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is error for a Circuit Court to grant a motion for non-suit at the commencement of a trial of a cause appealed from the District Court on the ground that the declaration fails to allege that the plaintiff is a corporation.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff commenced an action in the District Court for South Hilo, Hawaii, to recover damages for an alleged trespass, and judgment was entered against the defendant for \$150.00 and costs. The defendant appealed to the Circuit Court for the Fourth Circuit. In the latter court a stipulation was filed waiving a jury and agreeing that the cause might be tried to the court. When the case was called and the plaintiff had placed its first witness on the stand, the defendant moved that a non-suit be entered on the ground that the declaration was indefinite and uncertain in that it failed to allege that the plaintiff was a corporation. This motion was granted and the plaintiff excepted and comes to this court by bill of exceptions.

There is no allegation in the declaration that the plaintiff is a corporation. It is referred to as "Hawaii Mill Co., Ltd."; although the transcript from the District Court shows that proof was there made that the plaintiff was a corporation. The motion for non-suit was made after answer of the general issue. The joining issue under the practice in many of the states would be

held to be an admission of the character in which the plaintiff sued. 6 Thompson, Corporations, Sec. 7665 and cases cited in Note 3.

There are many cases that hold, that in actions by or against a corporation whether *ex contractu* or *ex delicto*, it is not necessary to allege that the plaintiff or the defendant is a corporation. 6 Thompson, Sec. 7658. "Most of these decisions proceed upon the ground that where the plaintiff or the defendant, as the case may be, is *described* in the declaration or complaint *by a name which naturally imports that it is a corporation*, that is a sufficient allegation that such is the fact, for the purposes of an action until it is controverted." *Id.* p. 6074. Other courts hold that it is neither necessary to allege that the plaintiff is a corporation or to prove that fact on the trial in the absence of a special plea putting the fact of incorporation in issue. *Indianapolis Sun Company v. Howell*, 53 Ind. 527; *Stanley v. Railroad Co.*, 89 N. C. 331; *Cement Co. v. Noble*, 15 F. 502.

This court held where the declaration showed that the plaintiff was a foreign corporation doing business in these islands that it was also necessary to show that it was "lawfully" doing business here for the reason, presumably, that the statutes required foreign corporations to comply with its provisions in order to be entitled to do business on these islands or to sue in the courts. *Hceia Plantation v. McKeague*, 5 Haw. 101. This case is not contrary to the general statement above quoted from Thompson.

The statutes of this Territory authorize corporations to have a corporate name and to sue and be sued in any court. (Sec. 2009, C. L.) There does not seem to be any more reason for requiring a corporation, an artificial person, to allege its capacity to sue by affirmative averments than there is for a natural person. The presumption of capacity indulged in favor of the latter ought to be extended to the former at least until the same is brought in question by proper plea.

This liberal rule of pleading seems particularly applicable to District Court cases since the pleading and practice in those courts is less formal than in courts of record and to such cases on

appeal where, as here, the trial on appeal may be had on the pleadings made in the lower court.

The motion for non-suit was improperly granted for the reason (1) that it was not necessary to allege in the declaration that plaintiff was incorporated (2) that there was nothing in the motion or pleadings, other than the plaintiff's name, to show that it was or was not a corporation.

The exceptions are sustained and a new trial ordered.

Smith & Parsons and *Thayer & Hemenway* for plaintiff.

Fitch & Highton for defendant.

LIBANA de NOBREGA v. SYLVANO de NOBREGA.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 21, 1902. DECIDED DECEMBER 5, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An appeal may be taken by a party in person or by a new attorney without a substitution of attorneys of record, from an order in respect to a matter, such as counsel fees, in which the interests of such party and his attorney are adverse.

Exception and writ of error, and not appeal, lies in divorce cases.

OPINION OF THE COURT BY FREAR, C.J.

Upon granting a divorce in this case the Circuit Court awarded an alimony in gross to the wife substantially one-half of the husband's real property. This court set aside that judgment on the ground that the court could not thus award or divide and divest the title of real property. 13 Haw. 654. An award of temporary

alimony was also held erroneous under the circumstances of the case. The court then awarded \$10,000 as alimony in gross. This court set aside that judgment also—on the grounds that the amount was excessive and that the time within which it should be paid was too short, and held that the amount should not exceed \$5,000 and that the most of it should not be required to be paid in less than six months. *Ante*, 152. The Circuit Court then awarded \$5,000 as alimony in gross and in the same judgment “further ordered, adjudged and decreed that out of the said sum of \$5,000.00 so adjudged and decreed to be paid to the said Libana de Nobrega, the sum of one thousand dollars (\$1,000) be paid to her attorney of record, George A. Davis, in accordance with an agreement in writing made between the said libellant and her said counsel on the 19th day of July, A. D. 1901.” The court further ordered that certain real estate of the libellee stand charged “with the said sum of five thousand dollars (\$5,000.00) hereby before ordered, adjudged and decreed to be paid to Libana de Nobrega, the said libellant and George A. Davis, her counsel, that is to say, to pay the said libellant the sum of \$4,000.00 on or before the 30th day of April, A. D. 1903, and the said George A. Davis the sum of one thousand dollars (\$1,000.00) on or before April 30th, 1903.” The libellant appeals from this allowance of \$1,000 as counsel fee.

Her counsel on this appeal who were not of counsel in the divorce suit contend that the Circuit Court went beyond the instructions of this court; that it had no jurisdiction to adjudge in this way a fee to an attorney from his own client; and that the allowance was outrageous in its amount.

Her counsel in the divorce suit moved to dismiss the appeal on the ground that it was taken through other counsel without a change of counsel of record, (though, we may remark in passing, the appeal was signed by her in person) and he contends that the case is still in his hands and that professional ethics requires that no change of counsel should be permitted until his fees are paid. He contends also that the fee allowed is not excessive.

The argument of “professional ethics” is certainly a strange

one to come from that side. It would more properly come from the other side. The interest of counsel in this matter of his fee is adverse to that of his client and yet he contends that he should be permitted to represent both himself and her, that is, both sides, and that she should be denied all opportunity to assert her rights until she has yielded them all to her adversary and deprived herself of the possibility of receiving any benefit that she might otherwise obtain by pursuing her remedy. Further comment on this branch of the case is unnecessary.

We are obliged, however, to dismiss the appeal on another ground, suggested by a question from the court at the hearing, and now relied on by counsel. The case was brought here by appeal. But it is clear under the statutes and former decisions that appeals do not lie in divorce cases. The appropriate method for bringing such cases to this court is by exception or writ of error.

It is to be regretted that the case is not properly before us, as there is so much that would seem at first glance to be questionable in the matter. Exceptions cannot now be taken and it is too late to sue out a writ of error. Whether the matter can be brought up by any other method we need not now undertake to say.

The appeal is dismissed.

Andrews & Andrade for appellant.

Geo. A. Davis, counsel, in person.

J. O. CARTER, Trustee, v. SYBIL A. CARTER, GEORGE R. CARTER, FRANCES I. CREHORE, AGNES C. GALT, CORDELIA J. CARTER, MARY H. S. DAVIS, and HENRY A. P. CARTER and GRACE S. CARTER, minors, represented by their Guardian *ad litem*, THOMAS FITCH.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 19, 1902. DECIDED DECEMBER 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under a provision in a trust deed for a change of trustees when in the opinion of one of the *cestuis que trust* and the guardian of others the trustee becomes incapable or unfit to act in the trust, the trustee need not resign upon the mere request of such *cestui que trust* and several other *cestuis que trust*.

Under a requirement for the trustee to convey upon the written request of one of the *cestuis que trust* and the guardian of others, a conveyance need not be made upon the written request of that *cestui que trust* alone even after a request by the guardian becomes impossible by reason of the arrival of all the *cestuis que trust* at the age of majority.

Property was conveyed in trust, "during the life" of A to allow her to occupy the property, she paying the expenses, or to pay her the net income or the net income of the proceeds, in case of sale, "and at her death in further trust" to allow her children to occupy until of certain age, their guardian paying expenses, or to pay them and their heirs, *per stirpes*, the net income, "and when all" arrive at the age, &c., to convey the property or pay the proceeds and unapplied income thereof, in case of sale, to those then living and the heirs of those deceased, *per stirpes*, &c. Held, the trust was to continue through the life of the life tenant, notwithstanding the arrival of all the children at the prescribed age meanwhile.

OPINION OF THE COURT BY FREAR, C. J.

This is a bill in equity brought by the plaintiff trustee for in-

structions as to his duty in several respects under a deed of trust made to him by Helen S. Judd and others, dated March 8, 1879, of the premises known as "Sweet Home," situated on the North-easterly corner of Judd and Nuuanu streets in Honolulu.

The trusts were in favor of the defendant, Sybil A. Carter, then wife of Henry A. P. Carter, since deceased, and their children Charles L. Carter (since deceased, leaving as his sole devisee and legatee his widow, now the defendant Mrs. Mary H. S. Davis, and as his sole heirs his minor children, the defendants Henry A. P. Carter and Grace S. Carter), Frances I. Crehore (formerly Carter), Agnes C. Galt (formerly Carter), and, the youngest, Cordelia J. Carter, who became twenty years of age on May 17, 1896.

The trusts are set forth in the *habendum* of the deed, which declares that the premises shall be held by the plaintiff, "his heirs and assigns forever but in trust nevertheless as follows: during the life of Sybil Augusta Carter wife of the said Henry A. P. Carter to allow her to occupy and enjoy the said estate she paying the taxes and all necessary charges and expenses or at her election to pay over to her the net rents and profits thereof or of the proceeds thereof if sold as hereinafter provided but in no event shall the said estate or any interest therein or the rents or profits thereof or the income of the proceeds thereof be subject or liable to any marital control obligations or direction and at her death in further trust to allow the children of the said Sybil Augusta Carter by the said Henry A. P. Carter and such person or persons as their guardian appointed by authority of a Court of competent jurisdiction in the said Hawaiian Islands or under the will of the said Henry A. P. Carter shall in writing nominate and appoint to occupy and enjoy the said estate until all of said children if they so long live shall have arrived each to the age of twenty years said guardian paying the taxes and all necessary charges and expenses or at the written request of such guardian for the time being to pay over to the said children and to the heirs and legal representatives of any of the said children who may hereafter decease the net rents and profits thereof in equal

shares according to the number of said children now living or hereafter born (such heirs and legal representatives taking by way of representation and not according to number) and when all of the said children shall if they so long live have come to the age of twenty years or if no one of them shall so long live at the death of the last surviving one of them to convey and transfer the said estate or to pay and deliver over the proceeds and all unapplied income thereof (in case of sale) in equal shares to such of the said children as shall then be living and to the heirs and legal representatives of any who shall have hereafter deceased (such heirs and legal representatives taking by way of representation and not according to number) or if no one of said children reach said age in like manner to the heirs and legal representatives of all of the said children by way of representation *But Provided* always and it is hereby declared and agreed that the said trustee and any successor in said trust upon the request in writing of the said Sybil Augusta Carter and of the guardian for the time being (appointed as aforesaid) of the said children or of any of them shall sell and convey or lease or mortgage the said estate or any part thereof or interest therein according as he may be so requested holding the proceeds thereof upon the same trusts as are herein expressed regarding the estate hereby conveyed and no purchaser at any such sale shall be answerable for the application of the purchase money or the said trustee or any successor in such trust may in his discretion at any time upon the written request of the said Sybil Augusta and of the guardian for the time being of any of the said children (being appointed as aforesaid) convey and transfer the estate hereby conveyed or pay over the proceeds thereof if sold to the said Henry A. P. Carter and the trust hereby created shall thereby be wholly discharged and released therefrom and it is further hereby provided declared and agreed that at any time after the death of the said Sybil Augusta Carter and while said trusts or any of them shall be undetermined the said trustee and any successor in said trust upon the written request of the Guardian as aforesaid will sell and convey or mortgage or lease said estate or any part thereof or interest therein

according as so requested holding the proceeds thereof upon the trusts aforesaid And it is further declared that for any sums of money which may be paid to the said Sybil Augusta Carter by the authority of these presents her sole receipts shall notwithstanding coverture suffice and *Provided always* and it is hereby further declared that if the said or any future trustee hereof shall die or in writing renounce the said trusts or go to reside abroad or decline to accept or (in the opinion of said Sybil Augusta Carter and of said guardian) become incapable or unfit to act in the trusts of these presents while any of them shall be subsisting then and in every or any such cases and as often as the same shall happen it shall be lawful for the said Sybil Augusta Carter and the said guardian or after her death for the said guardian by any writing or writings under their hands and seals attested by two or more witnesses to nominate and substitute any person or persons to be trustee or trustees hereof in place of the trustee or trustees so dying renouncing going to reside abroad declining or becoming incapable or unfit to act as aforesaid," &c.

1. The first question upon which instructions are asked is whether the trustee should resign the trust in consequence of a request to do so, in favor of J. R. Galt, made in 1899 by the defendants Sybil A. Carter, George R. Carter, Frances I. Crehore, Agnes C. Galt and Cordelia J. Carter.

It is clear from the language of the deed and seems to be conceded by all the defendants that, although the deed provides, in the second proviso of the portion above quoted, for a change of trustees upon the happening of certain events, the mere request of the *cestuis que trust* or some of them is not one of such events. Accordingly, so far as is shown in this case, the trustee need not resign. He may do so or not, as he pleases.

2. The second question is whether the trustee should comply with a request in writing made by Sybil A. Carter in 1899, with the consent of her surviving children, to convey the premises to one of them, George R. Carter, for \$18,000. The deed provides, in the first proviso above quoted, that the trustee may convey the premises "upon the request in writing of the said Sybil Augusta

Carter and of the guardian for the time being (appointed as aforesaid) of the said children or of any of them," &c. The method of appointment "aforesaid" is "by authority of a court of competent jurisdiction in the said Hawaiian Islands, or under the will of the said Henry A. P. Carter."

It seems not to be disputed and in our opinion it is the correct view that the written request of Sybil A. Carter and such guardian is a condition precedent to the execution of the power of sale, and that, since there is and can be no such guardian, all the children having become of age, that condition has not been and can not be fulfilled. See *Barber v. Cary*, 11 N. Y. 397; *Gulick v. Griswold*, 160 N. Y. 399; *Goebel v. Thieme*, 85 Wis. 286; *Crane v. Bolles*, 49 N. J. Eq. 373; *Sykes v. Sheard*, 2 De G., J. & S. 6. And yet, considering the particular language of this deed, much might be said in support of the view that the written request of Sybil A. Carter alone would under the circumstances be a sufficient compliance with the condition. See also *Leeds v. Wakefield*, 10 Gray 514; *Sohier v. Williams*, 1 Curtis 479; *Huckett v. Milnor*, 156 Pa. St. 1.

3. The third question is whether the trust terminated upon the arrival of the youngest daughter at the age of twenty years, though the life *cestui que trust*, Sybil A. Carter, was and is still living, and whether therefore the trustee should upon the happening of that event have conveyed the premises to the persons designated, subject to the life interest in the said Sybil A. Carter, or should do so now. This is the main question in the case. Its solution depends chiefly upon the construction of the first sentence, that is, the portion preceding the first proviso, above quoted from the deed.

This portion of the deed may be divided in substance as follows, though the divisions are not separated by punctuation marks or in any other manner in point of form. The property is to be held in trust: (1) "during the life" of Sybil A. Carter to allow her (a) to occupy and enjoy the estate, she paying the expenses, or (b) to pay her the net income thereof or (c) the net income of the proceeds thereof in case of sale, (2) "and at her death in fur-

ther trust" (a) to allow the children, &c., to occupy and enjoy the estate until all arrive, if they live so long, at the age of twenty years, their guardian paying the expenses or (b) to pay them and their heirs, *per stirpes*, the net profits thereof, (3) "and when all of the said children" shall come to the age of twenty years or, if none of them live so long, at the death of the last survivor, to convey the estate or pay the proceeds and unapplied income thereof, in case of sale, in equal shares to the children then living and the heirs and legal representatives of those then deceased, *per stirpes*, or, if none reach such age, to the heirs, &c., of all.

It is contended on the one hand that these are three co-ordinate provisions, the first intended to cover the period during the life of Sybil A. Carter, the second, the period after the death in certain contingencies, and the third, to be independent and take effect during either period, that is, even during the life of Sybil A. Carter, if all the children attain the prescribed age during that period, or, to put it another way, that the words "at her death" do not apply to part 3 as well as to part 2. On the other hand it is contended that parts 2 and 3 are alternate or sequential subdivisions, that is, that part 1 covers the period of the life of the life-tenant, and that parts 2 and 3 both refer to the period thereafter, or, to put it differently, that the words "at her death" introduces part 3 as well as part 2.

This latter contention, it seems to us, is the more reasonable. Those who support the former contention, that is, that the trust has terminated and that the property or its proceeds should have been transferred to the children when they all attained the prescribed age, even though the life tenant still lived, concede that the latter's life estate would not thereby be defeated. They concede that she would keep an equitable life estate and that upon the transfer the children would have merely the legal estate until death of the life-tenant. The grantor obviously had no such idea. She expressly provided in part 1 that the trust, not merely the equitable estate, should continue "during the life" of the life-tenant, and during all that time the trustee might have active

duties to perform under subdivisions b and c of part 1, and under part 3 the intention was that the conveyance and transfer, when made at all, should be plenary and carry the beneficial use as well as the mere legal title. The transfer was to be, not merely of the premises, but, in case it were sold, of the proceeds thereof, and not merely that, but also of the *unapplied income*, and to the children and their heirs, &c., and was not in terms required to be subject to the equitable life estate.

The argument was made in support of this view that the grantor could hardly have intended that in case of a sale the proceeds should be distributed among no telling how many heirs and its scattered fragments in the form of money held by them severally, subject to an equitable estate therein and with no security for the protection of the equitable life tenant. That argument is sound as far as it goes as tending to show the probable intention, on the theory that a reasonable construction should be adopted if possible, and although its force, as argued contra, may be lessened to some extent by the fact that it is a mere argument of expediency and not based on the language of the deed, yet the reasons that we have given above are not mere arguments of expediency. They rest upon the language of the deed. Part 1 expressly requires the trust to continue for life and part 3, if it means anything, means that the persons described are to have the equitable as well as the legal title. Consequently if part 3 should take effect during the life of the life tenant, the equitable estate of the latter would be defeated. In other words, the view that the trust terminated on the youngest child's attaining the prescribed age even though during the life of the life tenant, would require part 3 to be construed inconsistently with part 1 and would defeat one of the primary objects of the trust.

Moreover, it seems to us as natural, perhaps more so, to read parts 2 and 3 as both introduced by the words "at her death" and being alternate or sequential subdivisions, as to read part 3 independently and as having no relation to the words "at her death." It is at least doubtful which is the more natural. On either theory

the phraseology could be greatly improved. But the substance is more than the mere form and must prevail.

Another reason given in favor of the "termination" view is that part 2 is stated to be "in further trust" while part 3 is not introduced by any such words. This is at most a small matter of form and, especially considering that there are other inaccuracies of form in this deed, should be given little weight one way or the other. And yet we are not sure but that that little weight is on the side we have taken rather than on that on which it is urged. For, the word "trust" as here used is not the estate but the power or duty of the trustee. The property is given in fee but nevertheless in trust to do certain things, that is, to allow the life tenant to occupy, &c., and in further trust to allow the children, &c., and to convey to them, &c. Looking at the word "trust" in this sense, the use of the phrase "in further trust" rather supports the view that parts 2 and 3 go together and are "in further trust" with relation to part 1. Otherwise we should expect "in further trust" to be repeated in part 3.

It is further contended that the subsequent provisions of the deed bear out the "termination" theory. For instance, it is provided that the property may be sold, &c., on the request of Sybil A. Carter and the guardian, and, after the former's death, on the request of the latter alone; also that the trustee, if he should become incapable, may be removed and a new one appointed by Sybil A. Carter and the guardian or, after her death, by the latter alone. Hence, it is argued, the grantor intended that the estate should be easily handled, that future contingencies should be provided for, and that if the trust did not terminate on the youngest child's attaining the age of twenty years, during the life of Sybil A. Carter, there could be no sale, &c., and no change of trustee during the period from the time when the youngest child attained that age, to the death of Sybil A. Carter, because there could be no guardian to act as required by the deed. This last argument is perhaps the strongest on that side, for it points out a contingency unprovided for unless the "termination" theory is adopted, and the presumption is that all contingencies were in-

tended to be provided for. But the argument is one of mere expediency, to use the language of counsel above set forth in regard to a different argument in support of the opposite view. Further, the contingencies are not such as necessarily need have been provided for, and they could be met in part at least by a court of equity in the exercise of its well established jurisdiction over trusts. Again, when we consider that other contingencies were overlooked in this deed, the argument that the court should strain the language to meet the contingency in question is greatly weakened. Lastly, while the court should construe the deed, if possible, so as to avoid leaving contingencies unprovided for, it cannot supply deficiencies which actually exist. In a case of doubt the argument in question might control, but it cannot control when, as here, to allow it to control would be to override the manifest intention of the grantor in other respects and perhaps leave unprovided for more serious contingencies.

It is contended further that if the trust did not terminate upon the arrival of the youngest child at the prescribed age, there is technically no time at which it can terminate, since such child cannot at any time arrive at such age after the life of the life tenant, she having already arrived at that age during the life of the life tenant, and that therefore a perpetuity would be created. The trust will terminate when its purposes are fulfilled. Moreover, the words "and when all of said children shall" attain such age need not, even on the view that we take, be construed as necessarily having reference to the time after the death of the life tenant. The language is not very apt or definite, looked at from either standpoint. The words introducing part 2 are not "after her death" but "at her death." The intention was that at that time the trust should be to allow the children to occupy, &c., so long as any were under the prescribed age and, when, that is, then or thereafter, the children should be of that age, to convey, &c. Part 3 was to be alternative or sequential to part 2 as the case might require, though it must be admitted that the language is not felicitous. It is not felicitous on any theory.

But, as remarked above, the clearly expressed intentions on substantial points must prevail over mere verbal forms.

The case of *Schaffer v. Wadsworth*, 106 Mass. 19, supports our view in a general way, in both its reasoning and conclusion, although it is not in all respects parallel with this.

The fourth question is whether, if the trust terminated and a conveyance should be made by the trustee, the deceased son Charles L. Carter's portion should be conveyed to his widow, now Mrs. Mary H. S. Davis, defendant, or to his minor children, also defendants. The plaintiff in his bill does not request an answer to this question unless the court holds that the trust terminated, and none of the defendants seem to desire an answer to it except in the same event. Since, therefore, we hold that the trust did not terminate, we need not express an opinion on this fourth question.

The decree of the Circuit Judge is in accordance with the foregoing views on the first three questions but it goes further and sets forth instructions on other questions. As to such further instructions, upon which we express no opinion, the decree is reversed.

A decree will be signed in conformity with this opinion, on presentation in this Court.

Robertson & Wilder for plaintiff.

Kinney, Ballou & McClanahan for defendants other than Mrs. Davis and her minor children.

Holmes & Stanley for Mrs. Davis.

Fitch & Highton for the guardian *ad litem* of the minor children.

J. O. CARTER v. KOOLAU KAIKAINAHAOLE, Administratrix of the Estate of John W. Kaikainahaole, deceased.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 21, 1902. DECIDED DECEMBER 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When a mortgage has been foreclosed under the power contained therein and under the statute, without the aid of a decree of a court of equity, and possession is withheld from the purchaser at such sale by the mortgagor or those holding under him, equity has no jurisdiction, upon a bill brought solely for the purpose, to issue a writ of possession in favor of the purchaser.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity wherein the complainant avers that at a foreclosure sale ordered and had by the mortgagee in a certain mortgage under the power of sale contained therein and of the statutes applicable in such cases, he became the purchaser of the mortgaged premises, that all the requirements of the mortgage and of the law (detailing these to a certain extent) were complied with, that the title to the mortgaged premises was duly perfected in him, that he is entitled to possession and made demand for the same upon the respondent, who is the administratrix of the estate of the deceased mortgagor, and that the respondent refused to surrender possession. The prayer is for an order to remove respondent and all persons claiming under her from the premises and for a writ of possession. To this bill the respondent demurred on the ground, among others, that the complainant has a plain, complete and adequate remedy at law and that a court of equity has no jurisdiction to grant the relief prayed for. The demurrer was by the lower court sustained upon the ground just mentioned

and the bill was dismissed. From that decree the cause comes by appeal to this court.

It seems clear that if the mortgage had been foreclosed by proceedings in equity and the sale ordered by the court and completed, equity would have jurisdiction, even on a subsequent and independent bill, to issue a writ of possession to remove the mortgagor or those holding under him and to put the purchaser in possession; and from this it is argued for the complainant that the same relief will be granted in equity where the foreclosure sale was, as in this case, not under a judicial decree, but under the power contained in the mortgage. We think otherwise. In the class of cases in which equity does issue writs of possession, the reason is that having already assumed jurisdiction for the purpose of foreclosing the mortgage it will retain jurisdiction to do complete justice between the parties, or, where an independent proceeding is brought, that it will make its former order effective and not compel the purchaser to resort to another and different court to secure a compliance with the decree. In this case, however, neither of these reasons can be invoked. Equity has not at any time had jurisdiction of the main subject nor has it made any decree which it is now sought to enforce. The case presented by the bill is simply that of a complainant who has the title to and right of possession of certain land and from whom possession is unlawfully withheld by another. For this wrong he has the ordinary remedy at law of an action of ejectment. The mere fact that his title and right of possession can be traced back through a mortgage and a foreclosure sale thereunder is not sufficient to give equity jurisdiction. The remedy at law is certainly plain and complete.

It is contended, however, that such remedy is not speedy and not adequate because,—and of this the court is asked to take judicial knowledge—there is a large accumulation of law cases undisposed of in the Circuit Court of the First Circuit and consequently an action of ejectment, if now instituted by this complainant, would not be heard for a long period of time, perhaps two years. There is no doubt that, upon the case being reached,

the trial and the subsequent proceedings can be speedily disposed of and that the remedy, by enforcement of the judgment, will be complete and adequate. The delay due to the present condition of the calendar in the First Circuit,—assuming the facts to be as stated by the appellant,—does not of itself render the remedy slow or inadequate within the meaning of the rule or principle in question. If the contention of complainant were permitted to prevail, the assumption or denial of jurisdiction by equity would become a matter of great uncertainty, based upon an ever-varying state of circumstances. It is to be observed, moreover, that no real or permanent improvement in conditions would follow from the adoption of the view, if such were otherwise possible, that equity could take jurisdiction whenever a trial could thus be reached at an earlier date. The result would simply be to reverse conditions and to unduly encumber the calendar of equity cases.

The decree appealed from is affirmed.

Kinney, Ballou & McClanahan for complainant.

C. W. Ashford for respondent.

MARY K. TIBBETS v. S. PALI, Guardian of Oliva Lahela, a minor.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 25, 1902. DECIDED DECEMBER 10, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A motion to set aside a default is addressed to the discretion of the trial judge and is not subject to review on exceptions in the absence of an abuse of discretion.

The finding of a jury on a question of fact will not be set aside by this court where there is evidence to support it.

OPINION OF THE COURT BY GALBRAITH, J.

This was an action of ejectment to recover lands described in L. C. A. 78 to G. D. Kuaiaia and L. C. A. 8316 to Kamoiki, Royal Patent 1228, situated at Aipaako, Kunawai, Kapalama-uka, Honolulu, Oahu? There was a jury trial and verdict for the defendant in the Circuit Court. The plaintiff excepted and presents two grounds of exception (1) To the order of the Circuit Court in setting aside a default entered against the defendant and replacing the cause on the trial calendar; (2) That the verdict of the jury was contrary to the evidence and the weight of the evidence.

It appears that suit was commenced on June 30th, 1899, and the defendant served with process on the following day; that afterwards on August 7th the defendant was declared to be in default for failure to answer or plead; that two days later the defendant moved to open the default basing the motion on the defendant's affidavit which sets out: That he is the guardian of Oliva Lahela, (w) a minor, age 11 years; that during the early part of the year 1899 he retained counsel for the purpose of bringing suit against the plaintiff to quiet title to the land in dispute; that a bill for that purpose was drafted by his attorney during the month of June, 1899, and awaited his signature; that he was not informed of this fact until after the commencement of this suit by plaintiff; that on July 5th, 1899, he left Honolulu for the island of Hawaii on private business and did not return until July 30th; that immediately on his return he was informed by one of his attorneys that this suit had been commenced by the plaintiff and was asked if he had not been served with summons in the case; that he replied that he had been served with a paper on July 2nd, 1899, by a police officer who told him to appear before the court on August 7th, 1899, and that he did not know the significance of the paper; that he did not show the same to his attorneys or tell them about it, believing that said paper was the bill to quiet title for which he had retained counsel and that the paper served on him was notice from his attorneys to appear

and be ready for trial, in the action to quiet title, on August 7th; that he cannot read the English language and was unable to understand the purport of the summons and was thereby led to rely on the statement of the police officer and believed from such statement that all he had to do by reason of the paper served was to appear in court on August 7th; that he had never been cited in a civil action before and did not know that it was necessary for him to answer in 20 days after service; that he is in default in not having filed an answer within the time required by law; that he has as he believes and is advised a good defense to plaintiff's action; "that his defense is that the grantor of his ward, namely, the mother of said ward, and not the plaintiff's grantor, was the person mentioned in and intended by the deed of the original owner of the property in dispute, through which deed both the plaintiff and the defendant claim title; and defendant also relies upon the statute of limitation as his ward's grantor, namely, her said mother, has been in actual possession of said property for a period of over twenty years."

The motion to set aside the default was addressed to the discretion of the trial judge. In the absence of an abuse of discretion his ruling therein is not subject to review on appeal. The showing made in the affidavit was sufficient to support the order of the Circuit Judge setting aside the default, at any rate, we cannot say as a matter of law that his doing so was an abuse of the discretion vested in him by the statute.

The second exception involves the consideration of a question of fact. It seems that the plaintiff's and defendant's respective grantors of the land in controversy had a similar name, Lahela Kapoli. The question in dispute and on which the determination of the case hinged was one of identity as to whether the plaintiff's or the defendant's grantor was the grantee in the original deed from G. D. Kuaiaia. That question was submitted to the jury under proper instructions from the court. The trial lasted several days—numerous witnesses were examined in favor of and against the claims of each of the parties. The evidence would have sustained a finding in favor of either for the reason

that there was evidence to support such a finding. The jury found for the defendant. There is nothing in the record that would justify us in setting aside that finding and verdict. *Byrne v. Voeller*, 13 Haw. 494, 498.

The exceptions are overruled.

J. Alfred Magoon and *J. Lightfoot* for plaintiff.

Chas. F. Peterson for defendant.

IKEDA and KUBO *v.* HOE LUNG.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED NOVEMBER 21, 1902. DECIDED DECEMBER 11, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Appeal dismissed, there being evidence to support the finding of the Circuit Judge in a law case appealed to him from the District Magistrate.

Even if a violation of P. L., § 358, by leaving a wagon, without a horse attached, in the street for over fifteen minutes, were negligence *per se*, the evidence in this case warranted a finding that the wagon was not so left for so long a time.

So leaving a wagon in front of one's store for a few minutes while changing horses is not negligence *per se*, irrespective of the statute. Even if it were, it would not necessarily be contributory negligence where defendant's runaway horse ran into the wagon and damaged it.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal on a point of law from the Circuit Judge who, on appeal from the District Magistrate, found for the plaintiff, in an action for damage caused to plaintiffs' wagon by defendant's horse.

The plaintiff moved to strike the transcript of the testimony from the files for non-compliance with Rule 4 and because it was not formally made a part of the record; also to dismiss the appeal, principally on the ground that the point of law on which it was taken is not properly certified.

The merits as well as these motions were argued and under the circumstances we prefer to dispose of the case on the former.

The plaintiffs' wagon was injured by defendant's runaway horse on Front street, Hilo. The horse was a wild one. The defendant was riding it for the first time and indeed had never before ridden any horse. He was thrown and then the horse ran into the wagon. This was sufficient for a *prima facie* case against the defendant.

The only defense was contributory negligence, to make out which the burden was on the defendant. The only thing relied on to show such negligence was the leaving of the wagon for a time, without a horse attached to it, in the street near the sidewalk.

It is contended, first, that this was negligence *per se* because in violation of Penal Laws, §358, which prohibits the leaving of a vehicle on a street for more than fifteen minutes unless a draught animal is attached to it. But aside from the question whether a violation of that law would be negligence *per se*, the testimony was such as to warrant a finding that the wagon was not left for so long a time as fifteen minutes.

It is contended, secondly, that to leave a wagon in the street in that way at all was contributory negligence irrespective of the statute. The testimony was such as to warrant a finding that the wagon was there without a horse attached, in front of plaintiffs' store, only about five minutes or so, for the purpose of changing horses. We cannot say that that was negligence *per se*. Even if it were negligence, it would not necessarily follow that it was contributory negligence, that is, that it contributed to or was a proximate cause of the injury. That would probably have happened whether the horse was attached to the wagon or not,

and in all probability the plaintiffs' could not have avoided the danger after it arose by any amount of care.

The only point of law relied on is whether there was any substantial evidence to support the finding. In our opinion there was.

The appeal is dismissed and the judgment below affirmed.

Smith & Parsons and *Thayer & Hemenway* for plaintiffs.

Smith & Lewis, L. J. Warren and *Le Blond & Smith* for defendant.

ORPHEUM COMPANY, LIMITED, Plaintiff in Error v. W.
W. DIMOND & COMPANY, LIMITED, Defendant in
Error.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 24, 1902. DECIDED DECEMBER 12, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A writ of error is dismissed for the reason that the plaintiff in error failed to comply with the rule of this court in regard to filing briefs.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff in error, The Orpheum Company, Limited, sued out a writ of error to the Circuit Court, First Circuit, alleging that within six months last past judgment had been entered against it in that court and in favor of the defendant in error for the sum of \$177.15 and costs; that said judgment was unsatisfied and that there was error in the record of said proceeding, setting out two assignments of error: (1) that there was error as

specified in its bill of exceptions presented to the judge in said cause; (2) that the court abused the discretion vested in it by law in ordering execution to issue on said judgment pending an appeal to this court.

It appears that the defendant, plaintiff below, brought an action in assumpsit against the plaintiff in the District Court and sustained its claim by evidence; that the defendant in that suit did not offer any evidence or even cross-examine plaintiff's witnesses; that judgment was rendered for the amount of the claim; that the defendant appealed to the Circuit Court where judgment in like sum and costs was rendered against it; that on September 29th, 1902, a motion for the entry of judgment and the issuance of execution therein was made on the ground that the exceptions presented were frivolous and intended for delay; that on October 8th thereafter the judge ordered execution to issue.

The defendant in error moves to quash the writ on nine grounds. It will not be necessary to notice these in detail since it is doubtful if any one of them or all together are sufficient to justify us in granting the motion and since the case may be disposed of on another and surer ground.

The first assignment of error refers to a bill of exceptions for a specification of the errors therein assigned. This presumably refers to a paper that appears among the files entitled in the cause and designated "bill of exceptions." There is nothing on it to show that it was ever presented to the Circuit Judge. It does not bear the file mark of this court or that of the Circuit Court. However, an examination of this paper discloses that the only exception set out in it was that the judgment rendered by the Circuit Court in said cause was contrary to law and the evidence and the weight of the evidence. It also appears that there is no transcript of the evidence in the record although it is admitted that there was evidence introduced in the Circuit Court. We could not consider this assignment without the transcript before us. It is likewise impossible for us to pass upon the second assignment of error in the absence of the transcript of the evidence since the circuit judge is authorized to order execution after the

allowance of a bill of exceptions and pending the appeal if it shall appear to him that the exceptions are "frivolous, immaterial or intended for delay." Section 1439, Civil Laws. In this respect the record is incomplete and imperfect. However, it is not necessary to base our decision on this ground.

The motion was argued and submitted November 24, and no brief has been filed by the plaintiff in error. Rule 2 of this court provides that briefs shall be filed by appellant or plaintiff in error within 5 days after argument, unless the time be extended, and on failure to do so the "case or appeal may be dismissed."

The writ is dismissed for the reason that plaintiff in error has failed to comply with Rule 2 of this court.

C. W. Ashford for plaintiff in error.

Mott-Smith & Matthewman for defendant in error.

WONG CHOW *v.* LYLE A. DICKEY, District Magistrate of Honolulu, A. M. BROWN, High Sheriff of the Territory of Hawaii, and TUNG FOOK SING.

ORIGINAL.

SUBMITTED NOVEMBER 24, 1902. DECIDED DECEMBER 12, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

That part of Section 1435, Civil Laws, permitting execution to issue on judgments pending appeal does not apply to District Court cases wherein a jury trial is demandable as of right.

The District Magistrate has no authority to issue execution in such cases on a judgment rendered by him pending an appeal.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff, Wong Chow, petitioned this court for a writ of prohibition against Lyle A. Dickey, Esq., District Magistrate, A.

M. Brown, Esq., High Sheriff, and Tung Fook Sing, alleging that petitioner was a defendant in an action of assumpsit, before said District Magistrate, wherein the amount in controversy was more than \$20.00; that judgment was rendered against him in the sum of \$263.63; that he duly perfected an appeal from said judgment to the circuit court; that pending said appeal application was made to said magistrate for the issuance of execution on said judgment; that execution was issued on the 12th day of November, 1902, and delivered to the High Sheriff for levy on petitioner's property; that the said District Magistrate was wholly without authority of law to issue said execution; that Section 1435, Civil Laws, under which he pretended to act in the premises is unconstitutional and void, being in contravention of the provisions of Articles 5, 7 and 14 of the amendments to the Constitution of the United States and that petitioner is wholly without remedy at law except by process of this court prohibiting and restraining the defendants from proceeding to levy said execution on plaintiff's property pending said appeal.

An order to show cause was issued by the Chief Justice returnable before this Court at 10 o'clock a. m. on November 21st, 1902.

The return admits the entry of judgment, the issuing of the execution and its delivery to the High Sheriff for levy as in the petition set out and avers that the issuance of the execution was within the discretion of the District Magistrate and that its discretion was judicially, fairly and honestly exercised upon good cause shown and that the execution was legally issued and is a valid writ and entitled to be executed.

The defendant Tung Fook Sing for further return for himself averred that he stood ready and willing to indemnify the plaintiff, by a good and sufficient bond in any sum that might be ordered or agreed upon, against all damages that the plaintiff might sustain by reason of the issuing and levying of said execution, in the event the plaintiff shall prevail in his appeal and obtain judgment in the appellate court. The return prays for the dismissal of the order to show cause.

It is not contended that there is any authority of law for the giving of the bond of indemnity proffered in the separate return of the defendant, Tung Fook Sing. The absence of such authority is sufficient to effectively dispose of that part of the return.

The statute under which the execution was issued reads as follows: "An appeal duly taken and perfected in any cause provided for in this Act shall immediately thereafter operate as an arrest of judgment and stay of execution, provided that execution may issue pending such appeal upon good and sufficient cause being shown therefor." Section 1435, C. L.

This section is found in the chapter of the statute governing "Appeals and Exceptions" which includes the section providing for appeals from District Courts and was apparently intended to apply to all classes of appeals.

It is contended that this section is null and void at least so far as it may be held to apply to District Magistrates for the reason that, there being no provision for a jury trial in the District Court, to permit the issue of execution, on a District Court judgment pending an appeal to the Circuit Court where a jury trial is available is to deny or take away from the defendant the right to a jury trial guaranteed him by the VIIth amendment to the United States Constitution, also that its provisions are contrary to the guarantees contained in Articles V and XIV of amendments to the Constitution in that under this section the defendant may be deprived of his property without due process of law.

The right to a jury trial in all common law actions where the amount in controversy exceeds \$20.00 given by the seventh amendment is in full force and effect in this Territory. *Pringle v. Hilo Mercantile Co.*, 15 Haw. 705; *Lewers & Cooke*, ante, 290. It follows that no statute of the Territory can deprive one of this right.

There is strong ground for the contention that the issuing of execution on the judgment of the District Court where a jury trial is impossible, pending an appeal to the Circuit Court where such a trial is available, is practically a denial of the right to a jury trial. Such practice bears some resemblance to that of

"hanging the accused and trying him afterwards." To be entirely effective this right should be available before the defendant's property is seized and sold under execution. To seize and sell his property and then permit him to have a jury trial to determine whether or not it should have been seized and sold is, to put it mildly, placing restrictions about this constitutional guarantee that ought not to be upheld.

This ground is sufficient to sustain the prayer of the petition and to warrant the conclusion that that part of section 1435 permitting execution to issue pending an appeal cannot be held to apply to District Court cases wherein a jury trial is demandable as of right and does not authorize a District Magistrate to issue execution in such cases after an appeal has been perfected from the judgment and that the execution in this case was issued without authority of law.

The rule as prayed for should be made absolute. It is so ordered.

W. Austin Whiting and *C. F. Clemons* for petitioner.

C. W. Ashford for defendants.

KOOLAU KAIKAINAHAOLE, Administratrix of the Estate
of John W. Kaikainahaole, deceased, v. SAMUEL C.
ALLEN.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 25, 1902. DECIDED DECEMBER 16, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A mortgagee has his remedy against the land by foreclosure, even though he has failed to present his claim to the administrator of the deceased mortgagor within the time prescribed by Section 1525 of the Civil Laws.

A court of equity will not advise an administrator upon simple questions of law about which he should have consulted an attorney.

OPINION OF THE COURT BY PERRY, J.

The complainant, administratrix of the estate of John W. Kaikainahaole, deceased intestate, by bill in which the facts are averred in detail, asks a court of equity to restrain the respondent, who is the mortgagee in a certain mortgage executed by the decedent in his lifetime to secure the payment of a promissory note for \$2,500, from foreclosing the mortgage and from selling the mortgaged premises on the ground that the claim of the mortgagee was not presented to the administratrix within six months from the day of the first publication of the statutory notice published by her to creditors or within six months from the day when the note and mortgage became due and that therefore such claim is barred by the statute (Section 1525, Civil Laws) and the mortgagee is powerless to foreclose his mortgage. The administratrix also prays that she "may be fully advised and instructed by this Honorable Court, whether, in law, or in equity, she, as such Administratrix as aforesaid, should be held or permitted to pay such promissory note, or to in any manner satisfy or discharge the said mortgage? Whether the said Estate of John W. Kaikainahaole is in anywise, and, if at all, in what manner, and to what extent, liable to said defendant in the premises? Whether said mortgaged premises are in anywise, and if at all, in what manner, and to what extent, and upon what conditions, liable to sale under or by virtue of a foreclosure of said mortgage, either as a means of paying the principal, or the interest, or both the principal and the interest represented by said promissory note, or otherwise, or at all?"

Upon the filing of the bill and an approved bond in the sum of \$250 conditioned for the payment by the complainant, in case the injunction should be thereafter dissolved, of all costs, charges and damages suffered by respondent by reason of its issuance, a temporary injunction was issued enjoining the respondent from selling the mortgaged property at foreclosure sale, but this injunction was dissolved and the bill dismissed by final decree.

The complainant's bill was framed upon the theory that a

mortgagee who has failed to present his claim to the administrator of a deceased mortgagor within the time prescribed by the statute, has thereby lost his remedy by foreclosure. The law has, however, been decided to the contrary in this jurisdiction. In the case of *James Campbell et al. v. Kamaiopili et al.*, (1872) in which the same question arose, the Supreme Court said: "We do not think the act was intended to divest mortgagees of their titles or of their remedies against the land by foreclosure. The counsel for the respondents contends for a different construction of the statute. It is true that it refers to all claims, even if they are secured by mortgage, but as the mortgage and note are two distinct securities, and nothing but payment of the debt will discharge the mortgage, it follows that the mortgage is not barred, as the statute only refers to claims secured by mortgage, and not to the mortgage itself." See 3 Haw. 477, 478.

Counsel for the complainant recognizes the applicability of that decision, but contends that it is erroneous and asks that it be overruled. The law as laid down in that case has been a rule of property here for thirty years and is in accordance with the preponderance of authority elsewhere. It is unnecessary to set forth the various reasons which have been stated in support of the rule. No sufficient ground has been shown for overruling the decision.

Regarding merely as a bill for instructions, the bill cannot be sustained. While it is true that trustees may, under certain circumstances, come into a court of equity to seek advice and instructions, concerning their duty in the administration of the trust, we think that this is not such a case. The questions of law asked by the administratrix are such as can be readily answered by counsel. She is entitled to obtain from an attorney the desired advice at the expense of the trust estate. See 27 Am. & Eng. Encycl. Law 153 and *Greene v. Mumford*, 4 R. I. 313, 321-323.

The decree appealed from requires the complainant to pay the respondent the sum of fifty dollars as an attorney's fee necessarily incurred by the respondent in securing the dissolution of the temporary injunction. On this point the decree was made

without any evidence having been adduced to support it. Apparently the court merely allowed the amount which it thought would be reasonable compensation for the services rendered by respondent's counsel in procuring the dissolution of the injunction. It does not necessarily follow that that was the extent of the damages suffered by the respondent, for it may be that the respondent had paid or agreed to pay to his attorney in full for such services a sum less than that fixed by the Circuit Judge. Evidence was necessary in order to establish the amount of the damage, if any.

The decree appealed from, in so far as it orders the dissolution of the temporary injunction and the dismissal of the bill, is affirmed, and in so far as it relates to the attorney's fee, is reversed, without prejudice to the respondent's right to take such further proceedings as he may be advised are proper to recover such damages, secured by the bond, as he may be entitled to, and the cause is remanded to the Circuit Judge for such further proceedings as may be proper in conformity with this opinion.

C. W. Ashford for complainant.

Kinney, Ballou & McClanahan for respondent.

THOMAS MILNER HARRISON *v.* J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, DOROTHEA EMERSON (nee Lamb), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE.

MOTION FOR REHEARING.

SUBMITTED NOVEMBER 24, 1902. DECIDED DECEMBER 17, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Rehearing denied, on the ground that the point claimed to have been overlooked by the court in its former opinion was not in fact overlooked, but was substantially disposed of by the reasoning of that opinion.

OPINION OF THE COURT BY PERRY, J.

The verdict of the jury in this case was for the plaintiff, against all of the defendants. Upon exceptions, this court set aside the verdict and ordered a new trial. *Ante*, p. 418. The plaintiff now moves for a rehearing on the ground "that a point duly argued and submitted to this Court was overlooked by the Court in its decision filed on the 22nd day of October, 1902." The point claimed to have been so overlooked is stated in the motion to be "that the defendants L. C. Ables, T. E. Cowart and J. H. Kirkpatrick, who personally executed the agreement upon which this action has been brought, stand in a different position from those defendants who executed said agreement through attorneys; that the reasons assigned by the Court for ordering a new trial of said cause do not and cannot apply to the defendants above named, and that as to them the verdict of the jury should not have been reversed."

Of the nine persons named as defendants in the action, it seems that four, namely, Cowart, Kirkpatrick, Ables and Wolfenden, personally signed the agreement sued on, the names of four others were signed by alleged attorneys in fact, and one, Moore, did not sign at all. In our opinion on the questions raised by the exceptions we held, *inter alia*, that the instructions given by the presiding judge to the jury on the subject of the authority of the attorneys in fact to execute the agreement on behalf of Magoon, McStocker and Mrs. Emerson were erroneous, that the attorneys in fact had no such authority either under their powers of attorney or by virtue of their relation as partners in the A. P. & I. H. Co., that it was impossible to say whether the jury found that the contract was authorized, as they might have found under the instructions given, or that the principals had subsequently ratified the acts of the agents, and that the error was prejudicial. We further held that notice to and demand upon Kirkpatrick was sufficient notice to and demand upon all of the other members of the A. P. & I. H. Co., provided they all executed or subsequently ratified the Tasma-

nia agreement and that, if the parties can be held jointly, notice to one would be notice to all.

The point mentioned in the present motion, while not expressly referred to, was disposed of by the decision. It was not overlooked. The action was brought against nine persons. The notice and demand relied upon was shown to have been made upon Kirkpatrick alone or, perhaps, upon Cowart and Kirkpatrick; in any event, no notice or demand was shown to have been made upon any of the other defendants. The notice to Kirkpatrick could affect the other defendants only upon the theory of a joint liability. If all of the nine are jointly liable,—and upon the present state of the case it may yet be proved that they are—recovery cannot be had against three or four only of the joint contractors. With possible exceptions not material in this case, the recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability and in the latter case notice to one would not, by mere operation of law, be notice to any of the others.

Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and whether or not, in such case, notice to one would be notice to the others thus held jointly liable, are questions which have not yet arisen and upon which no opinion is expressed.

The motion is denied.

Robertson & Wilder for plaintiff.

Kinney, Ballou & McClanahan, J. A Magoon and J. Lightfoot for defendants.

D. L. AKWAI v. ROYAL INSURANCE COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 21, 1902. DECIDED DECEMBER 26, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an action on a policy of fire insurance for loss caused by the spread of a fire started by order of the Board of Health for the purpose of destroying, as being infected by plague, certain previously condemned buildings situated some distance from the insured building, an *ex parte* unexecuted resolution of the Board, adopted after the commencement of the fire, that all the buildings in the block, which included the insured building, were so insanitary and infected by plague as to require destruction, is not even *prima facie* evidence, that the building in question was so insanitary or so much of a nuisance as to be absolutely valueless in the eye of the law so as to entitle the defendant insurance company to judgment.

OPINION OF THE COURT BY FREAR, C. J.

This is one of the many fire insurance cases that have arisen out of the burning of Chinatown, in Honolulu, on January 20, 1900, by the spread of a fire started under orders of the Board of Health for the suppression of bubonic plague. In this case the only question is that of the measure of the damages, the defendant's contention being that the building was valueless because it had been condemned as insanitary by the Board of Health.

The fire was started by order of the Board for the purpose of destroying certain previously condemned buildings in one portion of the large block in another portion of which, some distance away, the building in question was situated. About 10 o'clock in the morning, after the fire was started, the Board

resolved that all the buildings in this block, including of course the building in question, "the same having been inspected by this Board are in the opinion of this Board infected with plague by reason of many cases of plague having been taking from said block, and in consequence of proximity to a place where a case of plague had occurred, and that it is necessary for the public health and safety that the buildings on said premises should be destroyed and that it is impossible to render them safe for occupancy by fumigation or other means and that such destruction shall be carried out forthwith," also that all such buildings, "same having been inspected by this Board, are in the opinion of the Board insanitary, a source of filth and a cause of sickness, and are incapable of being rendered sanitary by fumigation or any other means, and that it is necessary for the public health and safety that the buildings thereon should be destroyed by fire, and that such destruction shall be carried out forthwith."

These resolutions were made without giving the plaintiff an opportunity to be heard and he was never notified by the Board of their action. No order was given for carrying out the resolution. Meanwhile the fire already in progress got beyond the control of the Fire Department which had it in charge and spread to plaintiff's building, which was burnt at about 2 o'clock in the afternoon.

The Circuit Court after a trial, jury waived, rendered judgment for the plaintiff for the full amount of the policy, \$1000, and the defendant now comes here on an exception to that judgment as being contrary to the law and the evidence.

It is admitted that the plaintiff ought to recover the full amount of the policy but for the resolutions of the Board of Health. But it is contended that the resolutions are conclusive evidence that their recitals are true and that as matter of law it is absolutely impossible that a building that is infected with a dangerous disease from which the contagion cannot be removed and the prompt destruction of which is required by the

public safety can have any marketable, merchantable or other pecuniary value.

The question is so novel that naturally no cases have been found by counsel on either side directly in point, and so the arguments have been those of principle and analogy.

The defendant contends in the first place that the general rule, that the measure of damages is the actual value at the time of the fire, applies. But this does not help much. The question remains, what was such actual value in this case? If it was what the building could have been sold for, it might well be contended that some price could have been obtained for it, considering that, so far as appears, no one outside of the Board of Health and its agents knew of the resolution, and that intending purchasers, if they did know of the resolution, might be willing to take the chance of being able to prevent its execution through judicial proceedings or by persuading the Board to revoke or modify it, or might take the chance of being able to recover compensation in case the resolution were executed, especially considering that the building was new and that, so far as appears, no case of plague had occurred in it, and that the resolution was general covering a large area without reference to particular buildings, and that there was at least a question as to its validity in view of the facts that it was adopted without affording the plaintiff an opportunity to be heard, that he was never notified of it, that the statute was not complied with by first ordering the plaintiff to abate the nuisance and that the resolution required the abatement to be in a particular way, etc. If the rule of actual value at the time is applicable and the actual value is ascertained in the usual way, that is, as a question of fact, it would seem that the plaintiff would be entitled to recover something, and it is practically conceded that if he is entitled to recover at all he is entitled to recover the full amount of the policy. Further, the method of ascertaining the value in insurance cases varies according to the circumstances. For instance, a removable building on land held under a lease that is about to expire is valued in cases of this kind

without reference to the fact that it is worth much less for the purposes of removal. *Wash. Mills M'fg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503. See also *Ostrander Ins.*, Sec. 182. *May, Ins.*, Sec. 424. The defendant's proposition seems to be that the building cannot have any value in the eye of the law under the circumstances. Reference to the rule of actual value does not throw much light on that proposition.

It is further contended that the building could be regarded, after the passage of the resolution, only as a mere mass of infection and a public nuisance and as having ceased to be a building within the meaning of the policy—after the analogy of the case of *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430, in which it was held that there could be no recovery on a policy of fire insurance on a building when the burning did not take place until after the building had fallen and become a mere “congeries of materials.” The cases are not analogous, for in the present case the building still remained a building, aside from the question as to how far it had become infected or a public nuisance. If the building was without value, it was not because it was not a building. The Missouri case was based on the fact that the building was not destroyed by fire, not that a “congeries of materials” had no value.

The case is likened also to that of a horse with the glanders, which, it is contended, can have no value in the eye of the law. This comparison also does not hold. By hypothesis in the case of the horse, it had the glanders, while in the present case, the question as to whether the building was infected, or how much it was infected, is one of the questions in issue. Again, if the horse had the glanders it would surely die, but if the building was infected, might it not be disinfected? Need it be destroyed? It is also assumed that a horse with the glanders can as matter of law have no value. On this point that case does not help us out, for it at best merely presents in the case of the horse the same question that we have before us in the case of the building. If the horse were insured against death or disease, its value for the purpose of recovery on the policy would of

course be unaffected by the fact that it had the glanders. *Smith v. People's &c. Ins. Co.*, 173 Pa. St. 15; *Tripp v. N. W. &c. Ins. Co.*, 91 Ia. 278. And even if the Board of Health had resolved after inspection that the horse had the glanders, that would not make it so and would be no defense for killing the horse, if it in fact was not so afflicted. *Miller v. Horton*, 152 Mass. 540. And this brings us to the point on which we base our opinion.

Assuming that the building would be valueless if it were infected by bubonic plague or at least if it were infected to such a degree as to require destruction by fire or other means, the resolution of the Board of Health that it was so infected did not bind the owner in the absence of an opportunity to be heard. The statute (P. L., Secs. 877-879) authorized the Board of Health to cause nuisances to be abated. It did not authorize it to destroy that which was not a nuisance or to make or declare that to be, which was not in fact, a nuisance. Its power to destroy depended on the fact of nuisance, and not on the fiat of the Board. The public safety might perhaps require it in the exercise of the police power to proceed without a hearing in a case of emergency. Its judgment, regarded as in the nature of a judgment *in rem*, might perhaps, unless reversed or modified, determine once for all and as against the whole world the status of the building, that is, that it should be destroyed. But it could not, at least in the absence of an opportunity to be heard, determine that the loss should fall on the owner or bind him as to the intermediate findings upon which the final judgment was based. One such intermediate finding was that the building was infected. See *Miller v. Horton*, *supra*; *Cole v. Kegler*, 64 Ia. 59; *Hennesey v. City of St. Paul*, 37 Fed. R. 565; *Hutton v. City of Camden*, 39 N. J. L. 122; *City of Salem v. Eastern R. Co.*, 98 Mass. 431; *People v. Board of Health*, 140 N. Y. 1.

Of course the mere fact that the Board resolved that the building ought to be destroyed or ought to be destroyed by fire, apart from the question of infection, could not relieve the insurance company, if the building were destroyed by fire before

the execution of the resolution. An incendiary or a mob might have resolved the same thing but, however probable it might be that the resolution would be carried out, it could not affect the right to recover on the policy. Indeed, if such a resolution (for destruction, without reference to infection) should be literally carried out by means of fire before the destruction of the building by other fire, that itself would be a loss within the terms of the policy. As we understand it, the contention is, not that the Board resolved that the building ought to be or should be destroyed, but that the building was in fact such a nuisance or so thoroughly infected that it ought to be destroyed, that the resolution was the evidence of this fact, and that a thing that was such a nuisance was valueless or worse than valueless. But, as we have seen, the Board could not conclude the plaintiff on that point without notice and an opportunity to be heard, if it could at all.

It is, however, contended that the resolution on this point, if not conclusive, is at least *prima facie* evidence that the building was a nuisance, and that the presumption arising therefrom was not rebutted. If the resolution were *prima facie* evidence, it might be a question whether there was not enough to justify a finding that it was overcome, considering that the building was new, that the resolution itself seems to indicate that no case of plague had occurred in it and that the resolution was general covering a large number of buildings *en masse*. But, however, that may be, in our opinion the resolution was not even *prima facie* evidence that the building was so infected as to require destruction. Some of the decisions go to the extent of holding that the action of a Board of Health or other appropriate civil authority in a matter of this kind after it has been carried into execution is admissible as *prima facie* evidence for some purposes in an action between the owner and such authorities or their agents, but we do not see how a mere *ex parte* unexecuted resolution of a Board of Health on an intermediate point, which the Board had no authority to adjudicate as an ultimate point, could properly be admitted as even *prima facie* evidence in an

action in contract between others. See *Mossman v. Gov't.*, 10 Haw. 421.

The exception is overruled and the judgment below affirmed.

W. A. Whiting, F. E. Thompson and C. F. Clemons for plaintiff.

W. R. Castle and P. L. Weaver, counsel in another similar case, argued for the plaintiff, by permission.

Robertson & Wilder and L. A. Thurston for defendant.

CONCURRING OPINION OF PERRY, J.

At the trial in the court below the plaintiff's case consisted in introducing the policy for \$1000 covering the building in question, an admission by defendant that the building was wholly destroyed by fire at the time named in the declaration and proof, either by oral testimony or by stipulation of the parties, that the building was erected by the plaintiff within a year previous to the fire at a cost of about \$3000, and that at the time of the fire there was other insurance on the building amounting to \$1000 covered by another policy issued by the defendant company. By stipulation filed in this court, the parties declare that it was made to appear to the lower court upon the trial "that if it were not for the circumstances of this case which are claimed by the defendant to control the measure of damages the defendant would concede that the plaintiff is entitled to recover the amount claimed." The plaintiff having rested, the defendant introduced in evidence three documents: (a) a certified copy of an extract from the minutes of a meeting of the Board of Health held on January 10, 1900, to the effect that the Board had passed a resolution that in its opinion all the buildings in that part of Block 15 bounded by an imaginary line drawn along the Waikiki side of Kaumakapili Church to Kukui St., Kukui St., Nuuanu St. and Beretania St., were infected by plague and that the public health and safety required their immediate destruction by fire; (b) an original letter, dated January 19, 1900, from C. B. Wood, President of the Board of

Health, to Andrew Brown, Fire Commissioner, authorizing the latter to destroy by fire all of the buildings just mentioned; and (c) a certified copy of two resolutions by the Board of Health, passed on January 20, 1900, at 10 a. m., one being "that all of the buildings in Block 15 bounded by Nuuanu, Kukui, River and Beretania streets be considered infected by plague, the same having been inspected by this Board are in the opinion of this Board infected with plague by reason of many cases of plague having been taken from said Block, and in consequence of proximity to a place where a case of plague had occurred, and that it is necessary for the public health and safety that the buildings on said premises should be destroyed and that it is impossible to render them safe for occupancy by fumigation or other means and that such destruction shall be carried out forthwith," and the other, that all of the buildings in that Block, "same having been inspected by this Board, are in the opinion of the Board insanitary, a source of filth and a cause of sickness, and are incapable of being rendered sanitary by fumigation or any other means, and that it is necessary for the public health and safety that the buildings thereon should be destroyed by fire, and that such destruction shall be carried out forthwith." The plaintiff then admitted, as a part of the defendant's case, "that the fire escaped from the limits which the Board of Health ordered to be burned to the premises of plaintiff; that the fire was started under the Board of Health order about 9:30 a. m.; that the resolution condemning the whole block was passed at a meeting of the Board of Health at ten o'clock that morning; that plaintiff's premises were destroyed about two o'clock that afternoon;" and that said premises "were within the block destroyed." With this the case for the defense was closed. In rebuttal, the plaintiff gave testimony to the effect that prior to the destruction of his building he received no notice of the condemnation. It was not shown by any of the evidence that the Board had issued any order for the execution of its resolutions concerning the westerly half of the block.

The defendant's sole exception is to the decision and judg-

ment on the ground that they are contrary to the law and to the evidence, and, thereunder, the only defense is as to the measure of damages, it being undisputed that the defendant is liable if the building was not valueless. The contention is that plaintiff can recover only the actual value of the building at the time of the loss and that, upon the evidence as it stands, the court must rule, as matter of law, that the building had no value, in other words, that the building had no value because (1) the two resolutions above referred to were passed by the Board of Health on the day of the fire prior thereto and (2) the building was infected with plague to the extent stated in those resolutions.

For ascertaining the actual value of a building different methods have been adopted in different cases, varying according to the circumstances. Sometimes such value is declared to be the cost of construction less an amount representing the depreciation due to age. This, perhaps, would be the criterion most favorable to the plaintiff in the case at bar; the building cost \$3000 and was practically new when destroyed. No material depreciation due to age was shown or could have been shown. Another method would be to find the income-producing capacity of the building and from that calculate its value. Again, the market value has been suggested as the "actual value." This, I think, is the standard of measurement most favorable to the present defendant.

Let it be assumed,—what is at least doubtful—that the market value is the correct test and that the peculiar conditions relied upon by the defendant can be considered at all as elements in the valuation. The value is to be ascertained as of the time of the loss and in the light of the circumstances then existing as they appeared to intending purchasers. The only circumstance suggested as having a depreciating influence on the price is the passage of these resolutions of the 20th of January. But those resolutions were not passed until ten o'clock on the morning of that day and in all probability were, at two o'clock in the afternoon, known to but a very few, if any, persons aside from the members and officers of the Board, and could not have had any effect upon intending purchasers ignorant of their pas-

sage. As to the mere fact that plaintiff's building was situated in a block in other buildings of which plague cases had been found,—if indeed this can be properly inferred upon the record—it certainly can not be held as matter of law that that fact of itself would cause such intending purchasers, ignorant of the resolutions, to lessen their estimates for purposes of bidding from \$3000 to \$1000 or even to \$2000.

Let it, however, be even further assumed, in favor of the defendant, that the fact of the passage of the resolutions was at two o'clock known in the community generally. It is, of course, easy to understand that that fact would have a depressing effect upon the selling price. It may also be assumed in this connection that the Board of Health had the power to pass the resolutions at the time and in the manner in which it did pass them and that the resolutions would, as to any declarations on the subject of infection by plague, be conclusive and binding on the plaintiff in any proceedings thereafter had between him and the Board of Health or its members. It would at least be equally true that the Board would have the like power to set aside its findings of fact and to withdraw or rescind its resolutions. This last mentioned fact was, as well as the first, an element to be considered by intending purchasers; and, while it may be that many would have been deterred from bidding because of the passage of the resolution, it may well be that others would have been found able and willing to pay a substantial sum for the building, assuming the risk as to showing to the satisfaction of the Board that the building was in fact uninfected or that it could be disinfected by agencies other than fire and as to persuading it to rescind its former action. Who can say that that sum would not have been as much as \$100 or \$1000 or as much as \$2000? Can this Court say so, as matter of law? I think not.

It is further contended that the building was valueless because it was so infected with plague that it could not be disinfected except by destruction by fire. As to this also we must look back to the facts as they existed at the time of the fire and as they appeared to intending purchasers. It may even be

still further assumed that the building was in fact infected with plague. However conclusive the resolutions were upon the plaintiff, they clearly could not make or alter the facts as to the existence or the degree of the infection, so far as intending purchasers were concerned. Such purchasers,—I refer now to those willing to take chances as to securing a rescission of the resolutions—may well have differed with the Board as to the possibility and practicability of disinfecting without burning. They may well have firmly believed that the plaintiff's building, new as it was and with no case of plague traced to it or charged against it, was capable of being disinfected and rendered clean and safe by less costly methods. That was purely a matter of opinion upon which men had a right to differ. Even with these additional assumptions against the building, it cannot, in my opinion, be said, as matter of law, that no purchaser could have been found able and willing to pay as much as \$100 or \$1000 or even \$2000 for the building, much less that no bid at all could have been secured. The defendant concedes, as above stated, that if the trial court was not bound, as matter of law, to find that the building was valueless, the plaintiff is entitled to recover the full amount claimed.

If the test of income-producing capacity is applied, the same result is reached. From the mere fact of the passage of the resolutions it does not necessarily follow that the plaintiff's building at once ceased to have any earning capacity or rental value. The owner himself, even though the resolutions while in force were conclusive upon him as to the facts recited in them, may well have entertained the hope of being able to secure their revocation, and tenants, both actual and prospective, may, in spite of the declarations of the resolutions, have been found who regarded the building as fit for occupancy or as capable of being disinfected and rendered habitable and who were willing to pay rent for the use of it even though at reduced rates. The court can not, in my opinion, upon the mere proof of the resolutions, undertake to say as matter of law that no such tenants could have been found and that no rental whatever could have been obtained.

No reference has been made to the danger to the plaintiff's building at two o'clock in the afternoon from the advancing conflagration or from the fire declared by the Board of Health to be necessary, because fire was the very peril insured against and one, therefore, not to be considered as an element in the measure of damages.

For these reasons I am of the opinion that from the mere proof of the two resolutions of the Board of Health it cannot be held as matter of law that plaintiff's building was valueless at the time of the loss, and that there was sufficient evidence to support the decision and judgment and concur in the conclusion that the exception should be overruled.

WADE WARREN THAYER, Trustee in Bankruptcy of C.

T. Amana, *v.* A. LIDGATE.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED NOVEMBER 24, 1902. DECIDED DECEMBER 26, 1902.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The Circuit Court of this Territory and the Circuit Judges in Chambers have jurisdiction of actions at law and suits in equity brought by trustees in bankruptcy to recover money or other property transferred by the bankrupt to third parties in fraud of the Federal Bankruptcy Act before the institution of the proceedings in bankruptcy, and should exercise such jurisdiction when occasion arises, at least in the cases in which the Federal Court for this

Territory has not jurisdiction. *Bardes v. Hawarden Bank*, 178 U. S. 524, followed.

A trustee's remedy is by an action at law and not by a suit in equity, when the sole relief sought is the recovery of money so transferred by the bankrupt.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity the averments of which are as follows: That C. T. Amana, of Paauilo, Hawaii, was, on or about July 12, 1901, in the United States District Court for this Territory duly adjudged a bankrupt upon the petition of creditors filed June 24, 1901; that thereafter the complainant was duly elected the Trustee in Bankruptcy of said Amana, and ever since has been and now is the duly qualified and acting trustee; that within four months prior to the filing of the petition in bankruptcy, to wit, on or about May 23, 1901, Amana, in consideration of certain indebtedness of his to respondent, paid to the said respondent certain sums of money amounting in all to \$1,765.00; that at that time Amana was insolvent and in making the payments intended thereby to prefer the debt of respondent over the debts of his other creditors; that the effect of the transfer was to enable the respondent to obtain from Amana a greater percentage of the debt than could be obtained by any of the other creditors; that at that time respondent had reasonable cause to believe that Amana intended to so prefer his debt; that respondent now claims to be rightfully entitled to retain the money so paid as part payment of the debt due him and, although requested, refuses to pay over to the complainant said sum.

To this bill the respondent demurred on the grounds, (1) that the Circuit Court of the Fourth Circuit has no jurisdiction of the subject matter of the suit, but that the District Court of the United States for this Territory has jurisdiction and is the proper tribunal to hear and determine the matter, and (2) that complainant's remedy is at law, that he is not entitled to relief

in a court of equity and that the bill does not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer and dismissed the bill, on the ground, as we understand its opinion, that the District Court of the United States for this Territory has jurisdiction and that the Circuit Judge has not, and that even if the Circuit Judge has jurisdiction he is at least vested with the discretion to either exercise it or decline to do so as he may see fit and that, having such discretion, he declines, as a matter of courtesy, to hear the suit and leaves it to the "exclusive jurisdiction" of the federal court. From a decree in conformity with that opinion, the cause comes by appeal to this Court.

1. Whatever difference of opinion may have formerly existed on the subject, it is now settled that a District Court of the United States, as such, cannot, except by the proposed defendant's consent, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or other property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy. *Barde v. Hawarden Bank*, 178 U. S. 524 (1900). The precise question was involved in that case and fully considered and passed upon by the court. Where, as in this Territory, (see Section 86 of the Organic Act) the District Court of the United States is also given, by statute, the powers of a Circuit Court, it may be that the first mentioned court would have jurisdiction over suits of of the class just referred to provided there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States. Section 23, a, Bankruptcy Act; *Barde v. Hawarden Bank*, *supra*. The case at bar, however, is not within those exceptions. The District Court of this Territory, even with its enlarged powers, cannot, otherwise than by the defendant's consent, take jurisdiction over this suit.

Has the Territorial Circuit Court or its judge in Chambers jurisdiction of the subject matter of this case? Section 23, b, of the Act of 1898 provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose

estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." Referring to this clause, the court, in *Bardes v. Bank*, *supra*, p. 537, said: "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction," or, under certain circumstances, in a Circuit Court of the United States. So, too, in the case at bar, had there been no bankruptcy proceedings, the Territorial Courts would have had jurisdiction to entertain a suit brought by Amana to recover the property in question. If it should be contended that section 23, b, cannot apply to a case like the present one because the bankrupt could not have brought a suit to set aside a transfer made by himself in fraud of his creditors, that point, also, was decisively disposed of in the *Bardes* case, the court saying, at p. 537: "But the clause concerns the jurisdiction only, and not the merits of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it."

Our Circuit Courts have, under section 1144 of the Civil Laws, jurisdiction of "all civil causes at law, except as otherwise expressly provided," and the Circuit Judges in Chambers, under section 1145, "to hear and determine all matters in equity," both with certain limitations stated in Act 56 of the Laws of 1898. None of the exceptions or of the limitations referred to are applicable to this case. Nor did the Organic Act in establishing (section 86) a Federal District Court for the Territory, with jurisdiction over all "bankruptcy proceedings," (sections 1 and 2, Act of 1898) repeal those provisions, so far, at least, as the class of cases now under consideration is concerned. The

distinction between, on the one hand, an action at law or a suit in equity by a trustee against a third party to recover property which was the subject of a voidable preference and, on the other, "bankruptcy proceedings," within the meaning of the Act, is treated of in the *Bardes* case. Unaffected, then, by the Organic Act, our statutes clearly authorize the Circuit Court of the Fourth Circuit and its Judge in Chambers to hear, respectively, any civil action at law or suit in equity brought by a person, prior to bankruptcy, to recover property which he claims as his own against one asserting an adverse title to it, and, consequently, any such action or suit brought by the trustee of such person, after bankruptcy, to recover property of the bankrupt alleged to have been transferred under circumstances such as to constitute a voidable preference.

2. It remains to consider whether the complainant's remedy is at law or in equity. If the facts stated in the bill are true, Amana gave a preference which was voidable by the trustee and the latter may recover from the respondent the property transferred or its value. The property consists simply of a sum of money, definite and ascertained. No accounting is required, as prayed for. The only other ground upon which it is claimed that equity can take jurisdiction, is that of fraud. It is contended that courts of equity will take cognizance of all cases of fraud; but this is not strictly so. There are well-recognized exceptions. "To give relief in cases of fraud is one of the elementary grounds of the jurisdiction of a court of equity. An eminent chancellor has declared that the court 'had an undoubted jurisdiction to relieve against every species of fraud.'

* * * If this general language be understood to assert, that the jurisdiction extends to all possible cases in which a court of law may give relief, it must be received with some limitation. For the jurisdiction arose out of the inability of the common law tribunals to afford plain and adequate remedies in certain cases. The general rule has ever prevailed, and been recognized in the formal part of every bill, that a court of equity will not entertain jurisdiction, when the party appears to have a plain and adequate remedy at law." *Woodman v. Freeman*, 25 Me.

531, 540. In that case, after an exhaustive examination of the authorities, the conclusion was stated to be "irresistible both upon principle and upon authority, that the jurisdiction of a court of equity to give relief by the assessment of damages," where that is the sole relief sought by the bill and there is a plain, complete and adequate remedy at law, "cannot be sustained." See also *Miller v. Scammon*, 52 N. H. 609; 14 Am. & Eng. Encycl. Law, 2nd ed., 174, 175.

The complainant in this case has a plain, complete and adequate remedy at law. An action of assumpsit for money had and received will lie. All that he seeks or that can be decreed in this suit is the recovery of the money paid or the value thereof and this he can as fully obtain by a judgment in an action at law. No voidable deed, mortgage or other muniment of title is claimed to be outstanding, which can cloud his title or embarrass him in proceedings at law, or which a court of equity might more effectively render harmless.

In our opinion the trustee's remedy is at law and not in equity, and for this reason the demurrer is sustained and the decree appealed from affirmed.

Smith & Parsons and *Thayer & Hemenway* for complainant.

Mott-Smith & Matthewman and *Ridgway & Ridgway* for respondent.

MANUEL de QUADROS *v.* W. F. FREAR, YOUNG UN
CHOY and JOSEPH GOO KIM.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 17, 1902. DECIDED JANUARY 21, 1903.

GALBRAITH AND PERRY, JJ., AND W. AUSTIN WHITING, ESQ.,
OF THE BAR, IN PLACE OF FREAR, C.J., DISQUALIFIED.

K. conveyed to A. a lot of land which was described in the deed by metes and bounds. According to that description the westerly side of the lot ran "along Lot 3 and proposed road" and the rear side "along

Lot 5". Subsequently K. conveyed to B. other land adjoining the lot first mentioned. In an action at law by A. against B. for damages for alleged obstruction by the latter of a road called in the declaration "Rear Road" and therein described as "appurtenant to said lot" and as "running from the rear of said lot" to a point named, the plaintiff claimed at the trial that the words "and proposed road" had been inserted by mistake in the description of the westerly side of the lot and that it should have been inserted in the description of the rear side, and, in support of the allegation of the existence of said rear road and of his right to use the same, offered parol evidence tending to show that when he purchased the lot he did so "according to" a map or plat of a larger piece of land of which his lot was a part, which map or plat showed the proposed road as running from the rear and not from the westerly side. The map or plat was not attached to or in any way referred to in the deed. *Held*, that the parol evidence offered was inadmissible, under the circumstances, its effect being to vary or contradict the terms of the deed.

OPINION OF THE COURT BY PERRY, J.

This is an action wherein the plaintiff claims \$1,000 damages for the loss of the use of a certain road. The allegations of the declaration are, in brief, that the plaintiff was on the 29th day of September, 1890, ever since has been and still is the owner and in possession of a certain lot in Honolulu; that said lot "abutted on a certain road (herein called 'rear road') 18 feet wide and running from the rear of said lot to Kamakela Road;" that ever since the date named "said rear road has been appurtenant to said lot," and plaintiff "has had and still has the right to use the same as a road for passage on foot and with vehicles from said lot to Kamakela Road" and "has been accustomed to use the same as such until the commission of the acts hereinafter complained of," that on or about August 1, 1900, defendants obstructed said road by erecting a building across the same and have ever since so obstructed it; and "that said obstruction is a damage to plaintiff only."

At the trial, at the close of the plaintiff's case, the jury, in obedience to a direct instruction by the presiding judge, rendered a verdict for the defendant. The case comes to this court on seven exceptions, the sixth being to the instruction ordering the verdict and the seventh to the verdict. The remaining ex-

ceptions were to rulings excluding certain evidence. It is clear, and conceded, that the sixth and seventh exceptions cannot be sustained unless error is found in the rulings the correctness of which is questioned upon the other exceptions.

After the plaintiff had introduced in evidence a deed to himself, dated September 29, 1890, and executed by one Kaeo, of a certain lot of land situate on King Street, in this city, and being a part of the land described in R. P. 3229 to J. Moanauli, the witness Kaeo was asked, "Did you show Mr. Quadros any map of the lots?" and later, "The deed which you gave Mr. Quadros mentions a proposed road; what was that road?" The defendant Frear was called as a witness by the plaintiff and at the latter's request produced a deed to himself from Kaeo, dated February 2, 1891, of certain lots also described as being parts of Grant 3229 to J. Moanauli. The deed was put in evidence. The witness was then asked: "I believe your deed does not refer to any map; did you buy your lots according to a map?" Another witness for the plaintiff, an attorney, after testifying, in effect, that he had drawn the deed to plaintiff, was asked, "This deed says here in the second course that the course runs N. 85° 40' E., true, 90 feet along lot 3 and proposed road; do you know what these words 'proposed road' refer to?" and also, "Do you know whether or not any map was exhibited to Manuel Quadros before he bought his lot?" Objections to these five questions were sustained and the evidence excluded. In this the plaintiff claims that there was error.

The land conveyed by Kaeo to plaintiff, and to which the road in question is alleged to have been appurtenant, is described in the deed as follows:

"All that piece or parcel of land situate on King Street in Honolulu, described as follows:

N. 1 50 E. 'True' 35.5 feet along King Street;

N. 85 40 E. " 92 " " Lot 3 and proposed road;

S. 8 35 E. " 35.5 " " Lot 5;

S. 85 40 W. " 98.5 " " Lot 1, to the point of beginning. Area 3340 square feet, being a portion of premises

described in Royal Patent No. 3229 to J. Moanauli and conveyed to me by foreclosure deed of Bishop and Company this day and confirmed by deed of Mrs. Rosina K. Manaku to me this day recorded in Liber 125, page 387, and being a portion of the premises set apart to me by partition deed made by the heirs of J. Moanauli dated October 20th, 1887, recorded in Liber 103, page 441 et seq."

It is clear from the record that the case was presented by the plaintiff at the trial on the theory that the so-called "road" was a private right of way appurtenant to plaintiff's lot and that he, the plaintiff, acquired such right of way because he purchased the land described in his deed "according to" a map or plat of the Moanauli tract made by the grantor prior to the sale, which map or plat showed a road as leading from the rear of plaintiff's land to Kamakela Road.

For the purposes of this case it may be assumed to be true, as contended for by the plaintiff, that, if one conveys lots by a map or plat, which represents the lots as bounded upon such road or way, and the map or plat is referred to in the deed, a right of way over it passes as part of the grant of each lot as an easement appurtenant thereto. See Jones on Easements, §231. It has been so held, that conclusion being reached by some courts on the theory of an implied grant or covenant, and by others on that of estoppel or dedication. However that may be, one difficulty with the plaintiff's case is that his deed does not refer to any map or plat, nor is any map or plat attached to the deed whether with or without reference thereto. Perhaps, if a map were merely attached to the deed, without being referred to, the court might be authorized to regard it as a part of the description of the land conveyed and to make use of it in construing other parts of the description. But that aid is wanting here. Further than that, even assuming,—what is at least doubtful—that, if the deed were entirely silent as to any proposed road or as to its location, evidence could be adduced to show oral representations by the grantor as to the opening of a road or as to its proposed location in the rear of the lot, or, under this deed, that such evidence would be admissible to show such representations

as to a road on the westerly side, the deed to plaintiff expressly shows that the "proposed road" runs from the westerly side of the land and not from its rear and that on the rear it is bounded by Lot 5. To admit parol evidence tending to show that it was the intention and understanding of the parties that the proposed road should run from the rear and not from the side, which is what plaintiff sought to prove at the trial, (the allegation in the declaration, too, was that the road ran "from the rear of said lot") would be to admit parol evidence to vary and contradict the terms of the deed. For this purpose such evidence is not admissible. The deed is the final expression of the intent of the parties and cannot in this proceeding be varied by any parol evidence of representation made or any understanding had prior to its execution. Plaintiff's counsel stated at the trial that he wished to show that there was a mistake in the description. If the description in the deed, by reason of a mutual mistake, does not express the agreement of the parties, proceedings to reform the deed should have been first had in equity.

In argument in this court, counsel for the plaintiff seems to rely, in part at least, upon the theory that the road in question was a public road made such by dedication by parol. We think that this claim cannot now be set up. In addition to the fact that the evidence rejected was not offered for this purpose, the plaintiff's claim, as stated in his declaration, is, as we understand it, for the obstruction of a private right of way and not of a public road. The road referred to is declared to run from plaintiff's lot and to be appurtenant thereto, and the obstruction is declared to be a damage "to plaintiff only." An obstruction of a public road would be a damage to others also of the public, although the damage to the public generally would, perhaps, be different from that suffered by the plaintiff. The language used in the declaration is inconsistent with the theory of the obstruction of a public road.

In our opinion the evidence in question was properly excluded. The exceptions are overruled.

Russell, Fleming & Robinson for plaintiff.

Robertson & Wilder for defendant.

IN THE MATTER OF THE APPLICATION OF EDMUND
P. DOLE FOR A WRIT OF PROHIBITION
AGAINST GEORGE D. GEAR, SECOND JUDGE OF
THE CIRCUIT COURT OF THE FIRST CIRCUIT,
TERRITORY OF HAWAII, AND ELEANOR G.
DOLE.

ORIGINAL.

SUBMITTED NOVEMBER 19, 1902. DECIDED JANUARY 21, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Equity may grant maintenance to a wife without special statutory authority and independently of a suit for divorce or separation, on the ground that the remedy at law through the pledging of the husband's credit for necessities is inadequate.

This being deemed the better and more prevalent view at present in the United States, the court is not required to follow the old English rule to the contrary.

The old English rule need not be followed, for the reasons stated in the opinion, although (1) our statute (Civ. 1., § 1498) defining equity jurisdiction was copied from the statutes of Massachusetts where the old English rule is regarded as the correct rule, and (2) our statute (*Id.* § 1109) adopts the common law, as ascertained by English and American decisions, and (3) the legislature has made express provision for alimony in connection with divorce and separation (*Id.* Ch. 125).

Temporary maintenance may be granted in an equity suit for maintenance.

An order for such temporary maintenance is appealable.

The Circuit Judge is without jurisdiction to enforce such order by contempt proceedings pending an appeal.

Under a prayer for a writ of prohibition against further proceedings in a cause, a writ may be allowed against further proceedings in one branch of the cause and denied as to the remainder.

The rule that the writ will not be granted unless the question of jurisdiction has first been presented to the lower court, does not apply to summary proceedings of a quasi-criminal nature, as in cases of contempt.

OPINION OF THE COURT BY FREAR, C.J.

(GALBRAITH, J., DISSENTING IN PART.)

The respondent, Eleanor G. Dole, by her next friend, brought a bill in equity for maintenance against her husband, the petitioner Edmund P. Dole, before the other respondent, the Circuit Judge, and incidentally prayed for costs, counsel fee and temporary maintenance. After a hearing on a demurrer to the bill for want of jurisdiction and on an order to show cause why temporary maintenance, &c., should not be granted, the Judge held that equity had jurisdiction and ordered the petitioner herein to pay certain sums for costs of court, counsel fees and temporary maintenance within a specified time. From that order the petitioner herein appealed to this court before the expiration of the specified time and did not make the prescribed payments, and proceedings for contempt were begun to compel such payments, whereupon the petitioner sued out this writ of prohibition to restrain the respondents from proceeding further in the suit in equity—on the ground that equity is without jurisdiction of such a case. The Circuit Judge filed a statement to the effect that he had no answer to make to the writ. The other respondent demurred generally.

Three questions were raised and argued: (1) Has equity jurisdiction to grant permanent alimony or maintenance independently of proceedings for divorce or separation? (2) If so, has it jurisdiction to grant alimony *pendente lite*, &c.? (3) If so, is an order for such temporary alimony, &c., appealable?

The first of these questions, which is the main question, is one of considerable difficulty—not so much because of doubt as to what is or is generally considered the better doctrine at the present time or as to what is generally agreed to have been the former rule in England, whence we derive our system of equity for the most part, as because of the conflict between the modern view and the old rule and the question as to what our duty is under such circumstances.

Both at common law and under our statute (Civ. L., § 1890) a husband is in general bound to support his wife in the style in which he supports himself. The remedy at law for a neglect of this duty is for the wife to purchase necessities on her husband's credit and then for those who furnish such necessities to sue the husband for their reasonable value. In order to recover they must prove not only the reasonable value of the goods but also that the goods were necessary and that the wife was justified in living apart from her husband. There is no remedy at law for enforcing this right of the wife to support directly through an action by herself against the husband, and her chances of obtaining such support depend upon the degree of success she might have in attempting to persuade third parties to furnish goods, in the face, perhaps, of a notice from the husband not to do so except at their peril, and in the face of the probability, if not certainty, of being able to collect, if at all, only through a law suit which might cost in attorney's fees more than the amount, if any, recovered, which might, besides the annoyance of litigation, involve the disagreeableness of engaging in family troubles, and which might, after all, prove unsuccessful because of inability to prove the requisite fault on the part of the husband and merit on the part of the wife and that the goods furnished were necessary and appropriate, and as many suits have to be brought as there are persons who furnish necessities. This remedy can hardly be called adequate.

Accordingly many American courts take the view that equity may entertain an independent suit for alimony or maintenance—basing the jurisdiction mainly on the grounds of inadequacy of the remedy at law and the prevention of a multiplicity of suits. See *Pearce v. Pearce*, 31 So. (Ala.) 85; *Galland v. Galland*, 38 Cal. 265; *Hardy v. Hardy*, 97 Cal. 125; *Daniels v. Daniels*, 9 Col. 133; *Hanscom v. Hanscom*, 6 Col. App. 97; *Dye v. Dye*, 9 Col. App. 320; *Graves v. Graves*, 36 Ia. 310; *Farber v. Farber*, 64 Ia. 362; *Simpson v. Simpson*, 91 Ia. 235; *Butler v. Butler*, 4 Litt. (Ky.) 202; *Steele v. Steele*, 29 S. W. (Ky.) 17; *Helms v. Franciscus*, 2 Bland's Ch. (Md.) 544 (20 Am. Dec. 402); *Barber v. Barber*, 21 How. U. S. (on Md. law) 582;

Garland v. Garland, 50 Miss. 694; *M'Farland v. M'Farland*, 64 Miss. 499 (1 So. 509); *Edgerton v. Edgerton*, 12 Mont. 122 (29 Pac. 996); *Earle v. Earle*, 27 Neb. 227 (43 N. W. 118); *Cochran v. Cochran*, 42 Neb. 612 (60 N. W. 942); *Spiller v. Spiller*, 1 Hayw. (N. C.) 482; *Hodges v. Hodges*, 82 N. C. 122; *Bueter v. Bueter*, 1 S. D. 94; *Prather v. Prather*, 4 Desaus. (S. C.) 33; *Rhame v. Rhame*, 1 McCord's Ch. (S. C.) 147 (16 Am. Dec. 597); *Smith v. Smith*, 51 S. C. 379 (29 S. E. 227); *Almond v. Almond*, 4 Rand. (Va.) 662 (15 Am. Dec. 781). In North Dakota, also, this doctrine is strongly favored although the jurisdiction there is supported by statute. *Bauer v. Bauer*, 2 N. D. 108. This view is said to be held in the District of Columbia also (2 Am. & Eng. Enc. L. 2nd Ed. 95) whose reports are not in our library. Texas is often classed in this list on the strength of *Walker v. Stringfellow*, 30 Tex. 573, but that case does not go so far, and the contrary view receives support in *Trevino v. Trevino*, 63 Tex. 650. Ohio and Tennessee likewise are sometimes placed in this category, but apparently the decisions in those states were based on statutes. *Cox v. Cox*, 19 Oh. St. 502; *Richardson v. Wilson*, 8 Yerg. 67. This view is said to obtain in the British colonies of Jamaica and Barbadoes also. 1 Bish, M., D. & Sep. § 1399. In several of the states mentioned, e. g., California, Maryland and North Carolina, statutes in support of the jurisdiction have been enacted since the courts first held that such jurisdiction existed independently of statute.

The contrary view, denying jurisdiction, is supported by the English and many American cases. See *Ball v. Montgomery*, 2 Ves. Jr. 190; *Wood v. Wood*, 15 S. W. (Ark.) 459; *Ross v. Ross*, 69 Ill. 569; *Trotter v. Trotter*, 77 Ill. 510; *Johnson v. Johnson*, 125 Ill. 510; *Fischli v. Fischli*, 1 Blf. (Ind.) 360; *Chapman v. Chapman*, 13 Ind. 397; *Moon v. Baum*, 58 Ind. 194; *Shannon v. Shannon*, 2 Gray (Mass.) 285; *Adams v. Adams*, 100 Mass. 365; *Peltier v. Peltier*, Harr. Ch. (Mich.) 19; *Perkins v. Perkins*, 16 Mich. 162; *Doyle v. Doyle*, 26 Mo. 545; *Parsons v. Parsons*, 9 N. H. 309; *Lynde v. Lynde*, 54 N. J. Eq. 476; *Ramsden v. Ramsden*, 91 N. Y. 281. Georgia

also is often cited as holding this view, though we have not been able to verify this. The same is said of Pennsylvania also but the case cited, *Rees v. Waters*, 9 Watts 90, does not seem to be exactly in point, so far as we can judge from the digest, the decision not being at hand. In Louisiana, which is also cited the same way, the court seemed to regard the statute as prohibiting the jurisdiction. *Carroll v. Carroll*, 42 La. An. 1071. The Maine cases cited to the same effect seem to be explainable by reference to the statute. See *Jones v. Jones*, 18 Me. 308; *Henderson v. Henderson*, 64 Me. 419. In all, or nearly all, of the states cited above as supporting the view denying jurisdiction, as well as in many other states and Ontario and Manitoba, such jurisdiction seems now to be conferred by statute. See 2 Am. & Eng. Enc. L. 2nd Ed. 95; Stim. Am. St. L. § 6351; 2 Nelson, Div. & Sep. 962, 965; 1 Bish. M., D. & Sep. § 1399; and when so conferred is liberally construed. *Harding v. Harding*, 144 Ill. 588; *Bucknam v. Bucknam*, 176 Mass. 229; *Wood v. Wood*, 15 S. W. (Ark.) 459. Several of the decisions cited, e. g., all but one of those in Illinois supported the jurisdiction under statutory authority, the court stating however that the jurisdiction did not exist except by statute. Several denying the jurisdiction, e. g., in Massachusetts and New York, were influenced largely by local statutory provisions and historical considerations, and indeed are hardly in point, for they were not cases of this kind, and did not purport to decide the law in cases of this kind. In most, the question was first decided at an early date, before the change in the status of married women, and with little if any consideration on principle. In most of the states which support the jurisdiction, the question has been considered much more fully from the standpoint of principle as well as that of authority. It is evident both from the decisions and from the statutes as a whole that the jurisdiction is now generally regarded as one that should be upheld—unless the court is bound by the old English rule. The text books are much the same way. Some text-writers, especially the earlier ones, follow the old rule. But even when the weight of authority seemed to support that rule, Judge Story, in his work on Equity Jurispru-

dence, § 1423a said, with reference to the broader American rule that had already begun to gain headway, "there is so much good sense and reason in this doctrine, that it might be wished it were more generally adopted." Many of the more recent writers support the jurisdiction though as a rule they do not go into the question to any great extent. The two views have found their most vigorous advocates, among recent text-writers, in Bishop and Nelson, who discuss the question at considerable length, the former (1 M., D. and Sep., Ch. XLV) supporting the old and the latter (2 Div. & Sep. § 1000 *et seq.*) the prevailing present view.

We need not restate all the arguments *pro* and *con*. The weight of authority at the present time as well as principle favoring, in our opinion, the jurisdiction, the question is whether we are bound to follow the old English rule. There are no former Hawaiian decisions on the question, so far as we are aware, with the exception of a recent one by a Circuit Judge supporting the jurisdiction, which was not appealed from. The question of our duty must therefore depend largely upon the construction of our statutes. There are three statutes principally to be considered on this point.

First, there is the Act of 1876 defining the jurisdiction in equity. Civ. L., §§ 1497-1501. Sec. 1498 provides that certain courts "may hear and determine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law, that is to say: * * * (enumerating many classes of cases) and shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law." This statute would at first impression seem clearly to confer jurisdiction in this case, if we assume that the remedy at law is inadequate. And even if we should determine the question of the adequacy of the remedy at law by reference to the weight of judicial authority and "the usage and practice of courts of equity" rather than by reference to the plain fact, it is clear that we should have to come to the same conclusion in view of all the decisions at the present time. There

is nothing in this statute that requires the "usage and practice of courts of equity" to be ascertained by reference to the authorities at any particular point of time in the past or in England to the exclusion of the United States.

But this statute was copied from a like statute in Massachusetts (Mass. Gen. St., Ch. 113) and, assuming as is generally done, that the jurisdiction is denied in that state, (there is no doubt that it would be if it has not already been denied) in the absence of an express statute conferring it, the question suggests itself, whether we are not bound by the rule that when a statute is adopted from another state, the construction placed upon it by the courts of that state prior to such adoption is also adopted. And yet this rule does not apply here, first, because the Massachusetts cases above cited as denying jurisdiction, aside from the fact that they are not strictly in point on the question of jurisdiction in this class of cases, did not turn on the construction of the equity statute but were based chiefly on other statutory and historical grounds, and, secondly, because, in view of similar grounds, which do not apply here, the equity statute is construed in that state as an additional grant of equity jurisdiction to the courts of common law, and the exception of cases in which there is a "plain, adequate and complete remedy at the common law" is construed as referring to remedies at law as they exist under the statutes as well as to remedies as they exist at common law strictly speaking, with the result that, contrary to the general rule, equity is held not to have jurisdiction, even though it originally had it in England, if an adequate remedy is provided by statute (*Jones v. Newhall*, 115 Mass. 244), while the statute has already been construed differently here—as being a declaration of previously existing general equity jurisdiction, which is not ousted by the fact that other statutory as distinguished from common law remedies exist. *Haw. Com. & Sug. Co. v. Waikapu Sug. Co.*, 8 Haw. 449; *Wailuku Sug. Co. v. Cornwall*, 10 Haw. 476.

Another statute to be construed is that of 1892 (Civ. L., § 1109) by which "the common law of England, as ascertained by English and American decisions, is hereby declared to be the

common law of the Hawaiian Islands in all" except certain cases.

It is contended, however, that this statute has no application because this is a case in equity and not at common law. We need not decide this question, for, in view of our conclusion, we may assume for the purposes of this case that equity is included in the common law within the meaning of this statute.

One of the exceptions named in the statute is that the common law shall not apply when it is "otherwise expressly provided by the Hawaiian * * * laws." We have just held that the statute that confers jurisdiction "according to the usage and practice of courts of equity" does not require such usage and practice to be ascertained by reference to decisions at any particular period of time in the past or in England to the exclusion of the United States. Is not this, therefore, a case in which it is "otherwise expressly provided by Hawaiian laws" within the meaning of the exception named in the statute adopting the common law? There is much reason to believe that it is. But, assuming that it is not, still we are not bound by the old English rule for the following reasons.

The common law consists of principles and not of set rules. It therefore admits of different applications under different conditions. Moreover, by the terms of our statute it is to be ascertained by American as well as by English decisions. In *Morgan v. King*, 30 Barb. 9, the court, in construing a somewhat similar statute, said (at p. 13): "The adoption of the common law, in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules, without regard to local circumstances, however well settled and generally received those rules might be. Its rules are modified upon its own principles, not in violation of them" and (at p. 14) "when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England; and we have adopted it as a constantly improving *science*, rather than as an *art*; as a system of *legal logic*, rather than as a *code*

of *rules*. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed." See also Bouvier, Tit. Com. Law. In *Sayward v. Carlson*, 1 Wash. St. 29, in construing a similar statute, the court said (at p. 40): "But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore, we have the 'common law' as declared by the highest courts of this, that and the other state, and by the courts of the United States, sometimes varying in each. And we understand, by § 1 of the code, that where there are no governing provisions of the written laws, the courts of the late territory, and of this state, are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but not that the decisions of the English courts are to be taken blindly and without inquiry as to their reasoning or application to the circumstances."

The common law has been adopted by constitutional or statutory provision or judicial decision in nearly all of the United States. It had been expressly adopted by constitution or statute in many of the states in which the courts hold that equity has

jurisdiction in cases of this kind independently of statute, before such decisions were made, and yet, although the statute does not appear to have been expressly referred to in such decisions, the courts were undoubtedly aware of it and recognized their general duty to follow the common law and justified their departure from the English rule in this particular class of cases because of a change of circumstances. We need not consider at length all the changes in circumstances that have been considered as warranting a change in the application of principles of law in such cases. Considerable stress has been laid on the change in the status of married women and on the fact that we have no ecclesiastical courts which formerly in England had jurisdiction of questions of divorce and most other matrimonial matters. The reasoning that has been advanced in respect to these two changes in conditions, if viewed from the standpoint of strict logic, is not altogether satisfactory on either side of the controversy. But when we consider generally how much the English court of equity was influenced both by the then prevailing views as to the status of married women and by their reluctance to encroach upon the jurisdiction of the ecclesiastical courts in matrimonial matters, and that notwithstanding such reluctance they did in various ways, when they could find a reasonable excuse, assist married women when their husbands violated their duty to support them, and that the ecclesiastical courts themselves furnished relief in some ways no longer available, and that during the time of the commonwealth, when the ecclesiastical courts were abolished, equity did exercise jurisdiction in this class of cases, though as it is said, by express commission, and that it is not altogether certain that they did not do so in some cases at an earlier period, it is not unreasonable to suppose that they would have held the modern view under similar circumstances under the general rule that equity will act when there is not an adequate remedy at law, and that at least, considering the changes in circumstances and conditions, courts are now justified in applying that general principle rather than the old view as to its particular application. At any rate, in view of the American decisions as a whole as they have been made, we are not required, if we are permitted, by

our statute in regard to the common law to follow the old rule.

The third statute to be considered is that in reference to divorce and separation which provides for alimony also. Civ. L., Ch. 125. Are these provisions exclusive? So far as the statute relating to divorce is concerned there is no difficulty. Similar statutes are found in all or nearly all of the states that hold that equity has jurisdiction and are expressly held in many of them not to prevent such jurisdiction. To hold that a statute of divorce, even though it provides for alimony incidentally, prevents the equity jurisdiction, would be to encourage applications for divorce by wives who need assistance, to open the way for husbands, who desire divorces but have no grounds for obtaining them, to force their wives to apply for them; and at the same time to deny wives adequate remedies, because they would have to wait under most statutes some time before they could apply for or obtain a divorce and their husbands might meanwhile by disposing of their property put it out of their wives' power to obtain alimony, and the remedy through divorce would often be altogether beyond the remedy desired or needed.

The statute of separation offers greater difficulty. For that seems to cover almost the same ground that equity is held to cover in this respect, although even the relief by separation, by determining the status, might often exceed the relief desired.

The separation law cannot be regarded as preventing the equity jurisdiction merely on the ground that it provides an adequate remedy at law, for it is a general principle, often followed by this court, that if equity jurisdiction exists in the absence of a statutory remedy at law, it is not taken away by the grant of such a remedy. The jurisdiction in equity does not cease and revive from time to time with the enactment and repeal of statutes which confer a remedy at law. Nor does the separation statute necessarily prevent the equity jurisdiction under the rule, *expressio unius est exclusio alterius*, that is, on the ground that the statute relating to the subject of divorce and separation, which provides for alimony also, was intended to be complete and exhaustive on those subjects; for, although there may be much force in this argument, still in that statute the

legislature acted primarily on the subjects of divorce and separation and dealt with the subject of alimony only in so far as it was incidental to those subjects. It did not purport to cover the subject of alimony wholly or at all as an independent subject, and, as remarked above, the remedy through judicial separation, like that by divorce, though not in the same degree, may often, by reason of determining a status, exceed the remedy desired or needed. There are statutes of separation in some of the states where equity is held to have jurisdiction as well as in states where the contrary is held, but, although such statutes have been alluded to in several decisions on this question, we know of no decision on either side of the question which has turned on the existence or non-existence of such a statute. And so far as this argument is concerned, that is, that the statute of separation was intended to be exclusive, as distinguished from the argument that it affords an adequate remedy at law, it would apply also, if not with equal cogency, in regard to the statute of divorce, which, as we have seen, is held not to prevent the equity jurisdiction.

Our conclusion on the first question is therefore that equity may in a proper case grant maintenance independently of express statutory authority and that there is nothing in our statutes to the contrary.

The second question presented in this case is whether, assuming that the jurisdiction exists to grant permanent alimony, temporary alimony, &c., also may be granted. On principle this question must be answered in the affirmative and the authorities appear to be practically unanimous to the same effect. This is conceded by even those writers and courts which hold that equity has no jurisdiction to grant permanent alimony except under statutory authority. 1 Bish. M., D. & Sep., § 1411; *Harding v. Harding*, 144 Ill. 583; *Vreeland v. Vreeland*, 18 N. J. Eq. 43.

The third question presented is whether an order for alimony *pendente lite* is appealable. This depends upon whether the order is final or interlocutory within the meaning of the law of appeals, and, if final, whether there is anything in the nature of the order that requires it to be excepted from the general rule.

If it were interlocutory it would be appealable in the discretion of the Circuit Judge (Act 40, Laws of 1898), but he has not attempted to exercise such discretion in this case. If it is final, an appeal lies as matter of right. *Id.* The statute does not expressly confine appeals to *final* judgments, orders and decrees, but it has been so construed by this court in numerous cases. And yet this court has also recognized that a *final* decision for the purpose of appeal is not necessarily the last decision in the case and that its nature or effect rather than the stage at which it is rendered is the true test. *Barthrop v. Kona Coffee Co.*, 10 Haw. 398. Whether a decree or order for temporary alimony is appealable is a question upon which there is some difference of opinion. The following cases are cited as holding that it is not appealable: *Call v. Call*, 65 Me. 407; *Aspinwall v. Aspinwall*, 25 N. W. (Neb.) 623; *Lapham v. Lapham*, 40 Mich. 527; *Cooper v. Mayhew*, *Id.* 528; *Webber v. Webber*, 79 N. C. 572; *Gordon v. Gordon*, 88 N. C. 45; *Taylor v. Taylor*, 25 Oh. St. 71; *Collins v. Collins*, 71 N. Y. 269; *Earls v. Earls*, 26 Kan. 178. But in several of these cases appeals seem to have been entertained, the court merely holding that the amount of alimony was within the discretion of the trial judge and that the appellate court could not interfere with the exercise of that discretion—except, we presume, in case of abuse. It is doubtful how far others of these cases depended on special statutory provisions. In none of these cases is the question considered at length. Two reasons are given in support of such rulings—one, that the decree is interlocutory, the other that the statutory provision for temporary alimony, designed, as it is, to meet an immediate need, indicates a legislative intention that the general statute relating to appeals should not apply. The answer to the first of these reasons is that the decree or order is final in its nature, though it is not the last decree in the case or even the decree that determines the merits of the main case. It is independent of the main case in that the final decree in the main case cannot affect it and that it in no way depends on the ultimate result or the merits of the main case. It is a money decree enforceable immediately by execution or other process and the effect of which

is to divest the husband of his property. The answers given to the other reason are that, although the provision for temporary alimony is designed to supply immediate needs, the allowance of an appeal would at most merely delay the litigation until the propriety of the order for temporary alimony could be determined by the appellate court, and that the temporary inconvenience of the wife is not a sufficient reason for withholding from the husband a legal right. We may add that the argument against appealability in so far as it rests on the legislative intention assumed to be manifested by statutory provisions for temporary alimony in divorce and separation statutes, have no application to this case for the reason that here the alimony is granted under the general equity powers of the court and not under any statute. Accordingly, orders for temporary alimony, even when made in pursuance of statutes, are held appealable by the great majority of courts, the question having been considered at length in many of the cases. *McKennon v. McKennon*, 10 Okl. 400; *Blake v. Blake*, 80 Ill. 523; *State v. Seddon*, 93 Mo. 520; *Daniels v. Daniels*, 9 Colo. 133; *Sharon v. Sharon*, 67 Cal. 185; *In re Finkelstein*, 34 Pac. (Mont.) 847; *Gruhe v. Gruhe*, 123 Ind. 87; *Leslie v. Leslie*, 6 Abb. Pr. H. S. 193; *Blair v. Blair*, 74 Ia. 311; *Williams v. Williams*, 29 Wis. 517, and other cases, in the same and other states, cited in these cases. In our opinion the order is a final one for the purposes of appeal under the statute and we cannot make law by creating an exception to the statute.

It does not seem to be disputed that, if the order for temporary alimony is appealable, prohibition lies to prevent its enforcement by contempt proceedings pending the appeal which is alleged to have been taken. We presume also that, although the prayer is for a writ against further proceedings in the cause, that is, the whole cause, we may issue it to the extent required though it be to only one branch of the cause. *State v. White*, 24 So. (Fla.) 160. Nor has any question been raised as to the propriety of issuing the writ against the contempt proceedings, although as a rule prohibition is not granted until the question of jurisdiction has been raised without suc-

cess in the lower court, which was not the case here. But that rule is one of practice rather than of jurisdiction. *Bavemeyer v. Superior Court*, 84 Cal. 327, 403. And several exceptions to its application is recognized. One of these is that it does not apply in summary proceedings of a quasi-criminal character, such as proceedings for contempt, the result of which may be fine or imprisonment before the writ could be applied for and issued if it could not issue until after objection is made to the jurisdiction in the court below. See *People v. Carrington*, 5 Utah 531; *State v. Wilcox*, 24 Minn. 143.

Accordingly, the writ will be made absolute as to further proceedings in the contempt matter but dissolved as to further proceedings in the main cause.

Holmes & Stanley for petitioner.

Humphreys, Thompson & Watson for respondent, Eleanor G. Dole.

CONCURRING OPINION OF PERRY, J.

I concur, save only as to the reason for holding that §1109 of the Civil Laws does not preclude the adoption in this Territory of the view that equity has jurisdiction of suits for separate maintenance. As to the correctness of the reasoning of the Chief Justice on this point I express no opinion.

The Act of 1878 declares that our courts "shall have full equity jurisdiction according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law." As stated in the opinion of the Chief Justice, there is nothing in that statute that requires the "usage and practice of courts of equity" to be ascertained by reference to the authorities in England to the exclusion of those in the United States, in other words, nothing limiting the "courts of equity," whose practice is to be ascertained, to those of England to the exclusion of those of the United States. On the contrary, the correct construction of that statute is, and the intention of the legislature that enacted it was, in my opinion, that the courts whose power was being

declared should be at liberty, in determining their jurisdiction in equity, to follow the usage and practice of the courts in the United States as well as that obtaining in England. After a study of the usage and practice of the courts of equity of both of those countries, and without regard to the provisions of section 1109, we find, as held in the leading opinion, that the better view is that courts of equity have the jurisdiction in question, that is to say, that the statute of 1878 gave to our courts of equity or declared them to have, such jurisdiction. Now, assuming that equity is included in the common law within the meaning of section 1109 and that at the common law courts of equity did not have that jurisdiction, then the Act of 1878 made a different provision, the case falls within the express exception, "as otherwise expressly provided by the Hawaiian * * * laws," and, for this reason, the section itself does not apply.

OPINION OF GALBRAITH, J.

I concur with the conclusion of the Chief Justice in so far as it is held that equity had jurisdiction of the suit and that the court had the authority to make the order for alimony *pendente lite* but cannot agree that that order is appealable or that the writ of prohibition in this case should be made absolute to any extent.

It is true that the order granting the allowance to the wife is made under the general equity powers of the court but the appeal, if any, is taken under our statute. Sec. 1433 C. L. as amended by Act 40, Session Laws, 1898, reads in part: "Appeals shall be allowed from all decisions, judgments, orders or decrees of Circuit Judges in Chambers, to the Supreme Court, * * * whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued and deposit a sufficient bond in the sum of fifty dollars conditioned for the payment of the costs further to accrue in case he is defeated in the appellate court, or money to the same amount, within ten days after the filing of the decision,

judgment, order or decree appealed from" * * * Filing notice of appeal, paying court costs and filing bond for \$50.00, or depositing that sum in cash with the clerk to cover costs in the Supreme Court, if the decision should be adverse to appellant, acts as a stay of proceeding without filing the supercedeas bond required in most jurisdictions, unless the judge for good cause shown should order execution to issue notwithstanding the appeal, as he may do in certain specified cases. Sec. 1435 C. L.

The above statute on appeals has been construed to permit appeals only from "final" decisions, judgments, orders or decrees. *Barthrop v. Kona Coffee Co.*, 10 Haw. 398. In that case the court held that an order overruling a demurrer to a bill in equity was interlocutory and not a "final" order or decision and was not appealable.

In discussing the question, Mr. Justice Frear, speaking for the court, said: "If appeals were allowed from all such rulings it would be in the power of a defendant, even in a very clear case against him, to keep the case oscillating between the original and appellate courts almost indefinitely, to the great expense and annoyance and perhaps even practical denial of justice to the plaintiff, to say nothing of the annoyance to the courts and the occupation of their time with trivial matters. * * * Our statute is such that we cannot discriminate between interlocutory decisions so as to allow appeals on important occasions and not on other occasions," p. 401.

The force of this decision is recognized by the majority but it is sought to avoid it by holding that the order made allowing temporary alimony and counsel fees *pendente lite* is a final order on the ground that it finally disposes of the matter to which it refers. Is it any more final than the order overruling a demurrer or does it any more finally and permanently dispose of the matter raised than the decision on a demurrer? Clearly not.

An interlocutory order is defined "to be one made between the commencement and end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue," *Bouvier*. The "matter in issue" in this

case was the power of the court below to compel the husband to support his wife while living apart from him and induced to so live by his wrongful conduct. The order allowing alimony *pendente lite* and counsel fees was made between the "commencement and end of the suit," was an incident thereto and did not dispose of the "matter in issue" in the cause. Nor was it a final order in the sense that the court could not modify, or revoke it, on application, at any subsequent time. It was clearly an interlocutory order or decision and not appealable under our statute.

The cases cited in the majority opinion to sustain the conclusion that the order is final and appealable base such holding principally on the grounds that the judgment is a money judgment and that to deny an appeal would be to authorize the taking of the husband's property without the right of review and that "property rights" are of such a sacred nature that property must not be passed from the husband to the wife at the discretion of one Judge however great or good he may be. *Blake v. Blake*, 80 Ill. 523; *McKennon v. McKennon*, 10 Okla. 400. These cases overlook the very important point that the statute, and the common law in the absence of statute, imposes the duty on the husband, by reason of the marriage relation, when he has turned his wife adrift and without fault on her part compels her to live separate and apart from him, to supply her with necessities, and if he fails to do this and she is compelled to sue for them in the courts then he is liable for her reasonable counsel fees. These are "legal rights" conferred on the wronged wife by law. Temporary support is allowable to meet the "immediate necessities of the wife" (*Call v. Call*, 65 Me. 407). It seems to me that these rights given the wife are equally sacred and entitled to the protection of the courts with the property rights of the husband and should not be permitted to be frittered away by appeal. The Circuit Judge in making the order merely announced the judgment of the law on the facts.

It is also claimed that an appeal ought to be allowed for the reason that the husband could not "get the money back" if the order should be found to have been wrongfully made. Where,

as in this case, the marriage is admitted, and the allegations of the bill confessed by demurrer, the obligation to support the wife is fixed on the husband by law and there does not seem to be any possible circumstances under which he would be entitled to recover the amount of the allowance if paid. The only thing he can or could have to complain of on appeal is as to the reasonableness of the allowance. The error in this, if any, could be reviewed and corrected on the appeal from the final decree in the cause without injury or impairment of the rights of either party. There is no claim made on behalf of the husband that the allowance made by the Circuit Judge was unreasonable or excessive. The husband's salary is \$375 per month. The allowance to the wife was \$150 per month and \$250 as her counsel fees.

If our statute on appeals was similar to that in California, Montana, Oklahoma and possibly Colorado and Illinois in the requirement that the husband should file a supersedeas bond conditioned to pay the allowance if affirmed by appellate court, the cases cited from those jurisdictions in support of the conclusion of the majority would have much greater force. The single reason that the husband under our statute can appeal, if at all, without paying or securing the amount of the allowance even if approved by appellate court ought to be absolutely controlling and impel the court to deny an appeal where one is not clearly allowed by statute. The denying an appeal in this case does not withhold from the husband a "legal right" for the reason that he has no right to an appeal if none is given by statute, while the wife under the facts alleged in the bill and admitted by the demurrer has a "legal right" to expenses and support given by the statute which may be denied her altogether by allowing the appeal. To "make law" by construing the statute to allow an appeal in this case is to place it in the power of the husband, as has been so well said, "to keep the case oscillating between the original and appellate courts almost indefinitely, to the great expense and annoyance and perhaps even practical denial of justice to the plaintiff" and will also permit a husband who wants to void

his marital obligations and to turn his wife over to the tender charities of her friends to do so completely. Pending the appeal he may give away his property or send it out of the territory or he may remove himself from the jurisdiction and leave his wronged life partner with her order for alimony *pendente lite* and expense money, affirmed by the appellate court and with no means of enforcing the same.

It seems clear to me that the court ought not to make the writ absolute in any particular. To do so it is necessary to go altogether beyond the prayer of the petition for the writ. The prayer reads "Wherefore your petitioner prays that a writ of prohibition may be issued out of this Honorable Court addressed to the said Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, ordering and forbidding him to take cognizance of *the said cause*, and to the said Eleanor G. Dole forbidding her and her attorneys or any one on her behalf from prosecuting the said cause before the said Honorable George D. Gear, Second Judge as aforesaid, or any Judge of said Court, until the further order of this Court." The prayer only asks for the writ against proceeding in "said cause." "Said cause" is the suit for maintenance, the principal cause of action, not the incidental order allowing temporary alimony and counsel fees. The court finds that the petitioner is not entitled to the writ in "said cause" but gives something not asked for by making the writ absolute as to an incidental matter.

There is no doubt that the court below was proceeding in the contempt matter on the theory that no appeal could be taken from the order allowing temporary alimony and I submit that under the law it was justified in so proceeding. Since the majority has declared that it was proceeding on a wrong theory and that an appeal lies from the order there is no suggestion that the Circuit Judge will refuse to acknowledge and follow the law as so declared and that it would hold a return filed by the respondent that he had perfected an appeal from said order as a sufficient showing for failure to comply therewith and order his discharge.

Making the writ absolute in any particular is entirely uncalled

for and is unauthorized by any of the authorities cited in the opinion and it is dignifying the trivial allowance of one hundred and fifty dollars and two hundred and fifty dollars by the use of a "prerogative writ" where the ordinary proceeding of appeal gives perfect protection to every right the respondent can have in the premises.

The order ought to be discharged and the writ dismissed.

JOHN GASPAR *v.* J. K. NAHALE.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED JANUARY 6, 1903. DECIDED FEBRUARY 12, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Probable cause as ground for a suit for malicious prosecution does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.

A judgment for the defendant is found to be supported by the evidence and the exception is overruled.

OPINION OF THE COURT BY GALBRAITH, J.

This is an action for damages in the sum of ten thousand dollars for malicious prosecution. A jury trial was had in the Circuit Court and a verdict returned for the defendant.

The case is brought here by a bill of exceptions. The only exception set out in the bill is the general one that the verdict and judgment was contrary to the law and the evidence and against the weight of the evidence.

The defendant was and is now deputy sheriff of the District of North Kona, Island of Hawaii, and the plaintiff was and is a resident of that district. It appears from the record that in the early part of August, 1899, complaint was made to the defendant that the plaintiff and his son and another had stolen two

head of cattle and sold them to the butcher who was preparing to slaughter them; that the defendant after investigating the complaint caused the cattle to be returned to the claimant and the accused parties to be arrested on the charge of larceny in the second degree; that after a hearing before the District Magistrate the parties were discharged; that almost two years later (July 11th, 1901) the plaintiff filed this suit. The ground of the suit is want of probable cause for instituting the prosecution and malice on the part of the defendant.

"Probable cause," said Shaw, C. J., "is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." * * * "Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." *Bacon v. Towne*, 4 Cush. 217, 238, 239.

The rule is settled that malice may be inferred by the jury from the want of probable cause. *Kalaukoa v. Henry*, 11 Haw. 430.

The only question raised by the plaintiff's exception is, does the evidence necessarily show the absence of probable cause for commencing the prosecution?

The sale of the cattle by the plaintiff is admitted but it is contended that they were wild cattle and were captured on the mountains by the boys and that they belonged to him and he had a right to sell them. On the other hand it is contended that the cattle were not wild but were gentle and had been marked and that their ears had been recently cut off for the purpose of obliterating the marks. The plaintiff claims that the ears were bitten off by dogs in the capture. The preponderance of the evidence is to the effect that the cattle were not wild and that they belonged to the claimant.

It is not shown that any ill will existed between the defendant and plaintiff at the time of the prosecution. It does appear that when complaint was made defendant telephoned the plaintiff to meet him at the house of the party who purchased the

cattle on the following morning; that they met there and then went to the place of the claimant where the cattle had been removed and examined them; that on the same day the defendant said to the plaintiff that he would probably be compelled to arrest him and the boys on the charge of theft of the cattle; that the plaintiff asked about bail and the defendant's advice about selecting a lawyer to defend them; that the warrant was issued on August 5th and the plaintiff was not arrested until two days later; that when arrested he was released on \$100 cash bail although the offence charged under our statute is a felony and is punishable by two years imprisonment at hard labor or a fine not exceeding one thousand dollars (Sec. 132 P. C.); that almost two years intervened between the alleged injury and the commencement of this suit and that no action was ever commenced by the plaintiff to recover the cattle from the claimant.

From a review of the evidence it is apparent that there was ground for the existence, in the mind of the defendant, of an "honest and reasonable belief" of the guilt of the accused and that the jury were justified in the inference that there was probable cause for the prosecution and that the defendant was not prompted by malice in instituting the same.

If an officer acts honestly and with ordinary discretion in commencing prosecutions against persons accused of crime public policy forbids that he should be annoyed and harrassed by suits for malicious prosecutions even in cases where the District Magistrate may dismiss the charges. It is unfortunate for the plaintiff, if innocent, that he should have permitted himself to be surrounded with so many circumstances pointing towards guilt. This, however, was a misfortune for which the defendant is not liable in damages or otherwise. The evidence clearly supports the verdict of the jury and we find no sufficient reason for setting it aside.

The exception is overruled.

J. M. Viras and *C. C. Bitting* for plaintiff.

Jno. W. Cathcart for defendant.

ORPHEUM COMPANY LIMITED v. DIMOND & COMPANY LIMITED.

MOTION FOR RE-HEARING.

SUBMITTED JANUARY 9, 1903. DECIDED FEBRUARY 12, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A motion to amend an assignment of errors filed after a decision in a cause and pending the hearing on a motion for rehearing is denied.

In support of a motion for rehearing in a cause where the decision was based on the ground that counsel had failed to comply with Rule 2, requiring briefs, and it was shown that counsel thought he had obtained consent of the court to submit the matter on oral argument without briefs, the motion is granted.

On the merits of the cause it appearing that the record presents no material error the writ is dismissed and the judgment of the Circuit Court is affirmed.

OPINION OF THE COURT BY GALBRAITH, J.

A decision in this cause dismissing the writ of error was filed December 12, 1902. (*ante* p. 522). On the 16th of December the defendant filed a petition and motion for rehearing and on January 7th, 1903, a motion to amend the assignment of errors. In order to expedite the final disposition of the cause these motions as well as the merits of the cause were argued and submitted January 9th, 1903.

The motion to amend asks permission to amend the first assignment of error so as to allege error in the entry of judgment in the Circuit Court for the reason, (1) that there was not sufficient evidence offered to justify the judgment or any judgment against the defendant, plaintiff in error, (2) that the evidence did not prove that the goods, the value of which were

sued for, were delivered to the defendant, plaintiff in error, and also asks permission attach to the assignment of errors a transcript of the proceedings had and evidence given in the Circuit Court.

To grant this motion would be in effect not to allow an amendment but to permit a new assignment of error altogether. If the writ of error was sued out in good faith, and we assume that it was, and the assignment of errors was intended to present any meritorious questions to this Court for review, it was essential that a transcript of the evidence in the Circuit Court, if there was any evidence given there, should have been made a part of the record before the cause was presented to this Court in any form. This is clearly indicated in the opinion heretofore filed. It was within the power of plaintiff in error, if not its duty, to make the transcript of the evidence a part of the record. (Sec. 1446 C. L.) This was not done and now it is too late to ask "by grace" what diligence would have secured by right. However, it is not material what merit this motion may have possessed, had it been presented in due season, pending the hearing of the motion for a re-hearing, it comes too late and must be denied. *Bristol v. City of Chicago*, 21 Ill. 605.

The grounds set out in the motion for re-hearing are (1) that the court misinterpreted and misapplied one of its rules, (2) that counsel was excused by the court from complying with the rule (i. e. requiring briefs).

It appears from the showing made in support of the motion that counsel either obtained permission of the court, or thought that he had obtained such permission, to submit the motion on the oral argument without brief. In view of this fact it was a manifest injustice, though unintentional, to counsel to dismiss the case on the ground that he had failed to file a brief. We cheerfully avail ourselves of this opportunity to remove whatever reflection, on counsel's reputation for professional diligence, that order may have implied and set aside and revoke the order dismissing the writ of error, made December 12, 1902, and grant the motion for a rehearing.

We have heard oral argument and briefs have been submit-

ted on the merits in order that we might dispose of the cause at this time. It is pointed out in the former opinion in this cause that the record does not show any material error in the proceedings of the Circuit Court, or rather that the record is so incomplete that it is impossible for us to determine whether there was error or not. We did not dismiss the writ on that ground for the reason that the cause had not then been submitted on its merits. The failure of plaintiff in error to make a transcript of the proceedings and evidence taken in the Circuit Court a part of the record is sufficient reason for dismissing the writ. This fact is realized by counsel who admits in his brief that the "record is not in a condition to justify the court in reversing the action of the Circuit Court." He insists, however, that the writ should be dismissed, if his motion to amend is denied, so that he might have an opportunity of suing out another writ with a more perfect record.

It does not appear that any wrong was done the plaintiff in error by the former order or that any injustice would be done it by affirming the judgment of the Circuit Court. It was the counsel who claimed to have been injured by the former judgment. We have herein done what we could to right that wrong.

In view of the admission of counsel and the imperfect record presented we are inclined to the opinion that substantial justice demands that the writ should be dismissed and in the absence of a reasonable excuse for the imperfect state of the record and any showing of probable merit in the assignments of error the judgment of the Circuit Court should be affirmed. It is so ordered.

C. W. Ashford for plaintiff in error.

Mott-Smith & Mattheiman for defendant in error.

KAPIOLANI ESTATE, Limited, v. E. PECK & CO., Limited.**EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.****SUBMITTED JANUARY 9, 1903. DECIDED FEBRUARY 12, 1903.****FREAR, C.J., GALBRAITH AND PERRY, JJ.**

The presiding judge cannot, more than 10 days after the close of the term at which a case is tried and when no extension of time is granted within the term or within the ten days, make an order allowing additional time for the presentation of the bill of exceptions even though the parties consent to such order by stipulation made and filed after the term and after the expiration of the ten days. A bill of exceptions allowed solely by virtue of such an order, cannot, against objection, be sustained.

OPINION OF THE COURT BY PERRY, J.

On the opening day of the January session of this Court, the 5th inst., the plaintiff filed a motion to strike this cause from the calendar on the ground that the defendant had not "complied with all the requirements necessary for placing the said cause upon the calendar, in that no bill of exceptions has been allowed or signed by the judge of the Circuit Court having jurisdiction and who heard and tried said cause in said Circuit Court." The alleged bill of exceptions then on file did not bear the signature of the trial judge and did not in any way disclose on its face that it had been allowed. In answer to the motion, which was argued on the 8th inst., the defendant showed by affidavit that the bill had been in fact allowed by the Circuit Judge on October 21, 1902, that the certificate of allowance, duly signed, was on a separate piece of paper and was at that time "placed at the end of the bill of exceptions * * * and embodied" therein, (but not attached thereto) and that the bill with the certificate was thereupon filed with the clerk. This certificate,

however, prior to and at the time of the filing of this motion, was not with the records in the case and the judge on January 7, 1903, signed an order directing the clerk to attach to the bill a certificate of allowance, "a copy of which was signed October 21st, 1902."

At the argument it was contended for plaintiff, first, that the bill did not show on its face that it had been allowed and was, therefore, insufficient in form and, second, that even if sufficient in this respect, the Circuit Judge was without power to allow it at the time when he attempted to do so. This second objection to the bill was claimed by the defendant not to be presented by the motion, whereupon the plaintiff, on the same day, filed a second motion that the alleged bill of exceptions be declared to be no bill and that the cause be stricken from the calendar "on the ground that at the time of the allowance and signing of said bill of exceptions the Hon. G. D. Gear, who signed the same, was without jurisdiction or power, and that said bill was so allowed and signed without authority of law." The notice required by Rule 6 of this Court was waived by defendant and on the 9th inst. it was agreed by both parties that the second motion be submitted on briefs.

It may be assumed for the purposes of this decision that the first objection to the bill of exceptions argued under the first motion is untenable and also that the second point does not properly arise under that motion. The second objection is certainly presented clearly under the second motion. Nor was the latter filed too late as contended for the defendant, or in violation of Rule 1 of this Court. That rule in providing that "motions will be heard on the opening day of each session after the calling of the calendar," does not deprive the court of the power to hear motions on later days in proper cases.

As to the main question. The bill shows on its face that the September Term, (special) 1901, at which the trial was had, was begun on September 16. Under the law (see Act 2, Laws of 1898) the term must have closed not later than October 28, 1901. The bill, with the transcript of the testimony, was not filed until October 1, 1902, and was not allowed until October

21, 1902. The claim of the defendant is that the allowance at that late day was authorized and valid by virtue of a stipulation signed by the parties on November 20, 1901, approved by the judge on the same day and filed November 26, 1901, providing "that the defendant in the above entitled action has twenty days from and after the date of the filing of a transcript of the testimony in the above entitled cause within which to complete his bill of exceptions."

The statute applicable to the subject (Section 1438, C. L.), reads as follows: "A party may allege exceptions to any such opinion, direction, instruction, ruling or order, and the same being reduced to writing in a summary mode, and presented to the Judge during the term or within ten days thereafter; or, in case of proceedings in vacation as of the term, within ten days after the opinion, direction, instruction, ruling or order objected to, and being found conformable to truth, shall be allowed and signed by the Judge, but if the Judge shall refuse to allow and sign such exceptions, the truth of the allegations therein contained, may, nevertheless, be established before the Supreme Court, and the exceptions allowed by it; provided, that further time may be allowed by the Judge in his discretion." In our opinion, the final clause of this section does not authorize the judge to grant, after the expiration of the ten days or of any prior extension of time, an additional period within which to present the bill. He is empowered to allow a bill only if it is presented during the term or within ten days thereafter, although he may allow further time for its presentation; but if an extension has not in the meantime been allowed how does the case stand at or immediately after the expiration of the ten days? Is not the power then exhausted and is not the time for presenting the bill at an end? We think both questions must be answered in the affirmative. If not, what is it that has extended the time and what that has kept the power alive? In this case, the ten days expired not later than November 7, 1901. In the interval between that day and November 20th following, did the defendant have any right to file a bill of exceptions? We think clearly not; and all that the statute authorizes is an *exten-*

sion of time or an allowance of *further* time, and not the granting of a *new* right of appeal or a re-vesting of an old right once lost. If the extension attempted in this case is valid so would a similar one be which is given six months or a year after the expiration of the ten days. We cannot believe that it was the intention of the legislature to authorize such a procedure. The mere consent of the parties could not, of course, confer jurisdiction when none otherwise existed. For a like construction of similar statutes, see *In re Clary*, 112 Cal. 292, 295; *Bass Furniture Co. v. Glasscock*, 6 So. (Ala.) 430; *Rinehart v. Bowen*, 44 Ind. 353; *State v. Hill*, 98 Mo. 571, 572; *Webster County v. Cunningham*, 101 Mo. 642; *Burdoin v. Trenton*, 116 Mo. 358, 370; *Evans v. Ins. Co.*, 54 Wis. 522, 524; *Hake v. Strubell*, 121 Ill. 321, 329; *Turner v. Johnson*, 35 S. W. (Ky.) 923; and *White v. Guarantee Abstract Co.*, 96 Ia. 343.

The plaintiff is not estopped by his stipulation from claiming that the allowance of the bill is invalid. The defendant's right to present his exceptions was not lost by reason of that stipulation but had been lost prior thereto.

In our opinion, the allowance of the bill cannot, against objection, be sustained. The motion is granted.

Kinney, Ballou & McClunahan for plaintiff.

W. R. Castle & P. L. Weaver for defendant.

KAPIOLANI ESTATE, LIMITED v. M. S. GRINBAUM & COMPANY, LIMITED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 9, 1903. DECIDED FEBRUARY 14, 1903.

FREAR, C. J., GALBRAITH AND PERRY, JJ.

A motion to re-open a default is a matter within the sound, judicial

discretion of the trial judge, and the latter's ruling thereon will not be interfered with except in a clear case of abuse.

OPINION OF THE COURT BY PERRY, J.

The action in which error is claimed to have occurred was one of assumpsit upon a certain bill of exchange for \$966.70 alleged to have been drawn upon and accepted by the plaintiff in error and to have passed to the defendant in error by endorsement. Summons was served September 12, 1902, and on October 3 following the plaintiff in the action moved that, upon the clerk's certificate that the defendant had failed to file any answer or other plea to the declaration within twenty days after service, an order be made declaring the defendant in default, debarring it from the right to answer and authorizing one of the clerks to assess the amount of plaintiff's claim and to enter up judgment therefor. Such an order was made and judgment was entered for the amount found by the clerk to be due. The defendant then appeared and moved that the order of default be set aside and the judgment vacated and that it be permitted to answer. This motion the court denied.

Three errors are assigned. Of these the second assignment has been expressly and the first practically abandoned. The first is that the court erred in making the order of default and in entering up judgment. No reason has been suggested for holding this to be error. On the contrary the court appears to have in all respects complied with the express provisions of the statute and to have granted only what the plaintiff was under the circumstances entitled to demand and obtain.

The third assignment, upon which reliance is mainly placed, relates to the refusal to set aside the default. The matter was one within the discretion of the trial judge and his ruling should not be interfered with unless there was clearly an abuse of discretion. *Bishop & Co. v. The Pacific Navigation Co.*, 7 Haw. 276; *Macfarlane & Co. v. McCandless*, 8 Haw. 118. The affidavit of the treasurer of the Kapiolani Estate, Ltd.,—the only one filed in support of the motion to re-open—is to the effect

that the deponent "entirely and absolutely forgot the subject of said papers and of said action until the 3rd day of October, A. D. 1902," the day of the entry of the judgment, that this forgetfulness was the sole reason for the defendant's failure to answer in the action, and that "this deponent has this day made a full, fair and complete statement of the facts and all of the facts connected with the claim of plaintiff herein and the defense of the defendant to said claim, to C. W. Ashford, Esquire, an attorney of said Court; and that as a result of said statement of fact, this deponent is advised by said attorney, and he verily believes that said defendant has a full and complete defense upon the merits to said claim of said plaintiff in this action—to-wit: an entire lack of consideration for the acceptance of defendant, upon which this action is based." In opposition to the motion two affidavits were filed, one by one of the attorneys for Grinbaum & Co., and the other by an officer of that corporation. From the statements contained in these two affidavits, which need not be recited in full, the trial judge would have been justified in finding, and evidently did find, that the excuse offered by the defendant's treasurer was not founded in fact, that the defendant's claim that it had a meritorious defense, to wit, that of entire lack of consideration, was likewise not proven and that the facts, on the contrary, were that it had no good defense, that its treasurer had, both before and after the commencement of the action, promised to pay the amount claimed on the bill of exchange, and that the defendant was merely seeking further time in which to secure the funds to make payment and avoid execution. The affidavits presented a question of credibility. There was sufficient evidence to support the finding made. Under the circumstances we cannot say that substantial justice has not been done or that any abuse of discretion was committed in refusing to set aside the order of default.

The writ is dismissed.

C. W. Ashford for plaintiff in error.

Holmes & Stanley for defendant in error.

TERRITORY OF HAWAII *v.* SING KEE alias AH SAM.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED JANUARY 5, 1903. DECIDED FEBRUARY 16, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a case where, under the statute, an arrest may be made without a warrant, the District Court before which the accused is taken for trial acquires jurisdiction even though a warrant of arrest which was served upon such accused at the time of the making of the arrest was improperly issued by reason of defectiveness of the complaint or affidavit upon which it was based.

The "complaint" referred to in Section 606 of the Penal Laws is not the *charge* upon which the defendant is tried in the District Court. Under the practice prevailing in District Courts, such charge is orally entered upon the appearance of the defendant and is noted by the Magistrate in his docket.

Evidence otherwise competent and admissible, is not rendered inadmissible by the mere fact that it was obtained by an unauthorized search of the premises of the defendant.

The testimony of informers is to be judged, as to its truthfulness, by the same tests as that of other witnesses.

Certain alleged errors in the admission of evidence held cured by the charge.

OPINION OF THE COURT BY PERRY, J.

The defendant was tried and convicted in the District Court of Koloa, Kauai, of the offense of selling spirituous liquor without a license. After trial, on appeal, in the Circuit Court of the Fifth Circuit, the jury rendered a verdict of guilty. The case comes to this Court on a number of exceptions.

1. Before the drawing of the jury, the defendant presented a motion to dismiss the proceedings and for a discharge, upon the grounds, (a) that the District Magistrate of Koloa had no

jurisdiction of the person of the defendant, (b) "that the complaint upon which the defendant was arrested and tried does not sufficiently state any cause" and (c) "that said complaint does not state any direct and positive offense, but is sworn to on information and belief, contrary to law."

These objections to the affidavit, so far as they bear upon the question of the jurisdiction of the District Court, need not be passed upon, for even if the warrant was improperly or illegally issued by reason of its being based upon an affidavit insufficient in form or in substance, the District Court nevertheless had jurisdiction. The evidence shows that when the offense was committed police officers were present, about fifty feet away from the spot, in a store, where the liquor was handed over, and saw such delivery, and that they immediately rushed in and arrested the defendant. Under these circumstances an arrest without a warrant was legal. See sections 545 and 547, Penal Laws.

The contention that the "complaint upon which the defendant * * * was *tried* does not sufficiently state any cause," would seem to be based upon a misconception of the true function of the affidavit or so-called complaint. The sole function of the complaint, as provided for by section 606 of the Penal Laws, is to support the issuance of the warrant or, in other words, to enable the magistrate to determine whether or not there is probable cause to believe that an offense has been committed by the accused so as to justify his apprehension. The *complaint* referred to in that section is not the *charge* upon which the defendant is tried, although it is a statement in substance, and may also be in exact language, of the offense to be set forth in the charge subsequently entered against the defendant in Court. The *charge* itself is, under the practice prevailing in the District Courts, entered orally by the prosecuting officer upon the defendant's appearance and noted by the magistrate in his record, and it is upon the charge as thus entered that the trial is had. The precise form of the charge entered against this defendant in the District Court of Koloa, is not disclosed by the record before us, nor does it ap-

pear that any objection was made on the ground of its insufficiency, although the defendant was present and represented by counsel. We cannot assume, under these circumstances, that the charge as entered did not state an offense.

2. An exception was taken to the introduction in evidence of certain liquor and to the admission of testimony concerning the finding of such liquor, on the ground that the search-warrant issued did not authorize the search of the building in which such liquor was found. The search-warrant directed search to be made on "the premises of Sing Kee" situate "at Eleele, Koloa, Kauai, on the mauka side of the main road leading past the mill (old) going to Hanapepe." The evidence is undisputed that the building in question was within the same enclosure or yard in which Sing Kee's store stood. The words of the description, "the premises," are sufficient to include the second building as well as the store. But even if the search, as to the second building, was unauthorized, that would not of itself render the evidence thus found incompetent or inadmissible. See *Gindrat v. The People*, 138 Ill. 103, 4; *Williams v. The State*, 39 L. R. A. (Ga.) 269.

3. The admission in evidence of the liquor found in the second house was excepted to on the further ground that no evidence was adduced to show that the defendant had control of the house. With this, three other exceptions may be considered. One is to the admission of the testimony of a witness for the prosecution that in his opinion the total quantity of liquor found on the premises was more than is reasonably required for the use of one person or family; another, to a ruling permitting the deputy sheriff to read from his return endorsed on the search-warrant a list of the liquor found; and the third to a ruling permitting the prosecuting officer to read to the jury section 454, Penal Laws, which provides, *inter alia*, that "there being on such premises" (of any person) "more spirituous liquor than is reasonably required for the use of the persons residing therein, shall be deemed *prima facie* evidence of the unlawful sale of spirituous liquor by such person." This evidence was offered and received, and the section read, evidently for the

purpose of attempting to establish a *prima facie* case by reason alone of the possession of an unreasonable quantity of liquor. This phase of the case, however, was eliminated from the consideration of the jury by the court in its charge, and whatever error was committed was thus cured. The court charged the jury that the prosecution was under Section 444 of the Penal Laws, read section 457 which provides that delivery of spirituous liquor shall be deemed *prima facie* evidence of money or other consideration having passed, and said that it would not give the instruction (evidently such had been requested by the prosecution) as to Section 454 with reference to the quantity of liquor found. The presiding judge also said, in substance, that he had read the law which was applicable to the case, that the other questions of law which had been raised during the progress of the trial were to be disregarded by the jury, and that the sole issue before them was whether the three bottles of beer, which the defendant was charged with having sold, had been handed to the prosecuting witness for the consideration of one dollar, as testified to by the witnesses for the prosecution, or merely as a gift as testified to by the defendant and his witnesses. The defendant had admitted on the stand the delivery of the beer. Without reciting further the details of the charge, we think that the presiding judge made it clear to the jury that the question of the reasonableness or unreasonableness of the quantity of liquor found was not to be considered by them, that the one question of credibility was all that was to be determined and that that was with reference to the fact of consideration or no consideration and not with reference to the fact of delivery.

4. The court refused to give three instructions requested by the defendant, the substance of which was that the evidence of an informer, especially a "volunteer" informer, should be received "with caution and distrust," "with great caution and distrust," and should be "rigidly scrutinized," and that "the greatest caution" should be "exercised by the jury in giving credence and weight" to such evidence. In this there was no error. The instructions requested did not correctly state the law. The tes-

timony of informers is to be judged, as to its truthfulness, by the same tests as that of other witnesses. The motive or lack of motive, and the interest or lack of interest of a witness, in the matter concerning which the testimony is given, is always to be considered by the jury in determining what weight to give to such evidence, but this applies to *all* witnesses and not to informers only. The instructions requested went too far in singling out the informers as undeserving of credence. See *Honreck v. People*, 134 Ill. 139, 147; *U. S. v. Slenker*, 32 Fed. 691, 693; *Com. v. Ingersoll*, 145 Mass. 231. An instruction could, doubtless, have been given, touching upon the tests of credibility generally and this one of motive and interest in particular, which would have served as a guide to the jury in determining what weight to give to the evidence of the informer as well as to that of the other witnesses in the case and which would have been fair to the prosecution as well as to the defense, but none such was asked.

The exceptions are overruled.

J. W. Cathcart, Deputy Attorney-General, for the prosecution.

Creighton & Correa for the defendant.

J. D. PARIS *v.* LUIS VASCONCELLOS, THOMAS SILVA
and MANUEL G. SILVA.

APPEAL FROM DISTRICT COURT, NORTH KONA, HAWAII.

SUBMITTED JANUARY 9, 1903. DECIDED FEBRUARY 16, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A. leased to B. a whole ahupuaa situate in the District of North Kona and extending from the sea to at least the upper government road. There was some lantana on the demised premises ten years prior to the commencement of the term of the lease. *Held*, that evidence that the lessee had permitted the land to become overgrown with lantana, is not of itself a *prima facie* showing of a breach of the covenant not to suffer waste.

OPINION OF THE COURT BY PERRY, J.

This is an action for summary possession of land. The main allegations of the declaration are, that on July 23, 1891, Lahapa Halsey, a widow, executed a lease to the defendant Thomas Silva, for a term of twenty-four years from June 1, 1897, at a yearly rental of one hundred dollars of the land known as the Ahupuaa of Laaloa, situate in North Kona; that on August 24, 1891, Thomas Silva assigned to the Hawaiian Coffee & Tea Company, Limited, the lease as to a part of said premises, and that as to said part the said company assigned to the Kailua Coffee Company, Limited, on December 27, 1897, and the latter in turn assigned to the defendants Luis Vasconcellos and M. G. Silva by indenture dated September 28, 1900; that by deed from Lahapa Halsey, dated May 16, 1902, the plaintiff became the owner of the property; that the lease contained covenants by the lessee to pay the rent reserved annually in advance, without demand, in U. S. gold coin, and not to suffer any waste or any unlawful, improper or offensive use of the premises; that the defendants have failed to pay the rent and that on June 1, 1902, the sum of \$100 of rent remained unpaid; that the defendants "have permitted and suffered waste of the said premises, in that they have allowed the same to become overgrown with lantana and weeds, contrary to the covenant aforesaid, and that said premises are now so overgrown"; and that on August 11, 1902, the plaintiff made entry and determined the estate created by the lease, served notice of such determination on the defendants and made demand for possession.

At the trial in the District Court, J. Greig, a licensed attorney, appeared for defendants Vasconcellos and M. G. Silva, and filed a demurrer, signed "M. G. Silva, by John Greig, his attorney". This demurrer was overruled. The same defendant then filed an answer which is not with the record sent up to this Court, but in which, as shown by the Magistrate's minutes, he admitted the non-payment of the rent and denied the truth of the allegations as to waste; and also tendered into court the amount of the rent due, costs and interest, all of which was re-

fused by the plaintiff. No written answer was filed by the other defendants and upon motion of plaintiff based on the ground that they had "made no plea or answer", "judgment by default" was "entered" against them. The case then proceeded "on its merits as against M. G. Silva" and at the conclusion of the trial judgment was rendered for the plaintiff. From the judgment the defendants Luis Vasconcellos and M. G. Silva appeal to this Court on points of law.

The first question raised by the appeal is whether or not the Magistrate erred in entering judgment by default, and without any hearing, against the defendant L. Vasconcellos. In our opinion, he did. While the statute concerning summary possession, C. L., § 1683, provides that "if the defendant shall be defaulted" the plaintiff "shall have judgment for the possession" of the premises, it does not define what shall be deemed a default, but on the contrary says that "the suit shall be conducted like other civil actions before such Magistrate", meaning the District Magistrate. This immediately follows the provision concerning the time within which summons shall be made returnable. The requirements of the declaration are specifically set forth, but nothing is said as to any pleading by the defendant. In other civil actions, generally, before Magistrates, no written demurrer, plea or answer is required either by statute or by established practice. On the contrary, proceedings in those courts have always been somewhat informal and defendants may put in any legitimate defense without written pleadings. In the case at bar Vasconcellos, as well as M. G. Silva, appeared by counsel and cannot be held to have been in default. Thomas Silva's default, if such there was, cannot, of course, injuriously affect the other defendants.

Was the evidence adduced sufficient to support the judgment? The breach of the covenant to pay rent was cured by the tender made in court. Even if the tender had not been made until after judgment, the writ of possession could not be legally issued. "The issuing of such warrant of removal shall not be stayed in the case of a proceeding for the non-payment of rent, if the

person owing such rent, shall, before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings". C. L., § 1686.

No breach was shown of the covenant not to suffer "any unlawful, improper or offensive use" of the premises. The only breach claimed is that the lessees permitted the land to become overgrown with lantana, but this, if true, would not be a breach of that covenant. It is not a *use* of the land, within the meaning of that word as employed in the lease, to permit it to become overgrown with a noxious plant. Neither the lessees nor any one else caused or encouraged the lantana to grow as a means of deriving benefit from the land or for any other purpose; it came there and grew against the will of all concerned.

The main question, under this branch of the case, is whether or not a breach of the covenant not to "suffer any waste" was shown. The plaintiff's contention is that the defendants violated this covenant by permitting the land to become overgrown with lantana. The testimony given on the subject by plaintiff's witnesses is as follows: By J. D. Paris, plaintiff: "The land is almost entirely useless by being overgrown with lantana. The whole land from the sea to the upper government road is almost impassable. The coffee is damaged by the lantana. The growth of lantana is detrimental; it would take \$3,000 or \$4,000 to put the land in shape again. * * * A few years ago, there was very little lantana. * * * Saw the land about fifteen years ago, very little lantana on the land." By J. K. Nahale: "The lower portion is entirely covered by lantana, the upper portion has also lantana. Lantana is very injurious to land; several thousand dollars would have to be expended to put the land in shape. Ten years ago when Thomas Silva had the land there was not much lantana." By Thomas Silva: "I was the lessee. Sold the lease, still live on land. Reserved about two acres as a house. * * * When I got the land, there was not much lantana, then it was good pasture land, now it is not good pasture on account of lantana. Lantana is very bad for land. I tried to keep it clean, on account of my lease and also to get pasture.

* * * The lower portion of the land is entirely covered by lantana, some lantana above the road. The road through the coffee is almost covered with lantana. When I first got the land, some lantana was on the land. * * * If lantana overgrows, the land is good for nothing. If the lantana was cleared the land would be still good."

Waste has been defined to be, "the doing or suffering that to be done upon the premises which essentially injures or impairs the inheritance of the estate occupied by the tenant."—1 Wash., R. P., p. 129. "Any permanent or lasting injury done or permitted to be done, by the holder of the particular estate, to the inheritance or to the prejudice of any one who has an interest in the inheritance."—28 Am. & Eng. Encycl. Law 862. "An injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance."—Cooley, Torts, pp. 332, 333. "A spoil or destruction in houses, lands or tenements, to the damage of him who is in reversion or remainder. * * * It is a general principle * * * that the law considers everything to be waste which does a permanent injury to the inheritance."—1 Taylor, Landlord & Tenant, pp. 403, 404. Whatever the definition given by each, all the authorities seem to agree that the law of waste accommodates itself to the varying wants, conditions and usages of different countries, and that there is no absolute rule as to what shall constitute waste under all circumstances; and it is for this reason that but little aid is to be derived from decided cases showing what particular acts and omissions have been held to be or not to be waste. Another principle, equally well settled and of at least as great importance is, that in the construction of written agreements it is the intention of the parties as therein expressed that is to be sought and, when ascertained, given effect to.

Lantana is a thorny bush of rapid growth, able to withstand successfully long periods of drouth. It bears a large quantity of seeds and these are freely scattered by birds, wind and water, all agencies beyond the control of man. Once it has entered a section of the country, it spreads rapidly, and finally, if left to itself, forms a dense, tangled mass. By reason chiefly of the ex-

treme ease with which the seeds are scattered, it is a costly undertaking to clear and keep clear a large tract of land, especially if it is rocky or hilly. These are matters of common knowledge. There are doubtless ahupuaas, rocky in large part, of sloping ground and where conditions otherwise favor the rapid spread of lantana, which it would be impossible, after the lantana has gained a foothold, to clear wholly or to any great extent and yet leave a margin of profit from the income of the property. In the case of a lease of such an ahupuaa, containing the general covenant only as to waste and no express provision concerning lantana, it could not properly be held to have been within the contemplation of the parties in entering into the contract that the lessee was thereby undertaking to clear the land. To hold otherwise would be to give an unreasonable construction to the contract and to place upon the lessees of such lands a burden not expected of them by the lessors at the time the contracts were entered into and not then intended to be assumed by the lessees, and which would render the estate for years practically valueless to the lessees, depriving the latter of financial benefits which, reasonably, they must have expected. We think the reasonable rule is that if landlords, under such circumstances, desire to have their lands cleared, they should say so to prospective tenants and have a specific covenant on the subject inserted in the lease if one is accepted and entered into.

Whether injury will result to the inheritance is not always the sole test of waste. What men of ordinary prudence and diligence do under the same circumstances is also material to be considered in cases similar to that at bar. See Cooley, Torts, pp. 334, 335; 1 Wash. R. P., §288; Tiedmann, R. P., §77; and *Clemence v. Steere*, 1 R. I. 272, 274, 275.

The ahupuaa of Laaloa, it appears from the lease, is situate in the District of North Kona, Hawaii, and extends, as shown by the plaintiff's testimony, from the sea to some point mauka of the upper government road. The plaintiff's own testimony, uncontradicted, further shows that in 1887 there was some lantana on the land, in other words, that it had been growing there for ten years prior to the commencement of the term of the de-

fendants' lease, that at the time of the trial, when only five years of the term had expired, large portions of the land were thickly covered and that the cost of clearing at that time would have been from \$3000 to \$4000. No evidence, however, was adduced, tending to show that men of ordinary prudence and diligence would, under the circumstances, have cleared the land. The burden of proving this, was, in our opinion, upon the plaintiff. The evidence adduced shows at best an injury to the inheritance and nothing more, and the Magistrate decided the case practically as if such injury was the only test involved. In this we think that there was error. The evidence is insufficient to support the judgment and the latter must be set aside.

We are not prepared to say on the meager evidence before us that no showing could be made in this particular case, which would support a finding of waste; and since a new trial is rarely, if ever, ordered by this Court on an appeal of this kind, we think that the case should be dismissed without prejudice. Judgment set aside and case so dismissed.

Kinney, Ballou & McClanahan and *S. H. Derby* for plaintiff.

Smith & Lewis and *Thayer & Hemenway* for defendants-appellant.

WILLEMINA PROPER *v.* ANTON J. PROPER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 5, 1903. DECIDED FEBRUARY 19, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Service by publication in divorce cases, when required by the statute to be made in certain named newspapers, cannot be made in other newspapers.

That is so even though the newspapers named in the statute have ceased to exist at all or at least under such names.

That is so also even though since such cessation of such named newspapers service by publication has been made in other newspapers in a number of cases by order of various Circuit Judges covering a period of several years. The arguments of contemporaneous and long continued construction and hardship, if otherwise shown by the facts, do not apply in a case where the statute is explicit and does not admit of construction.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for divorce in which service was attempted to be made by publication. The only exception taken is to the order of the trial judge dismissing the libel on the ground that the attempted service was insufficient.

The statute, enacted in 1870 (Civ. L. Sec. 1933), provides that in cases of divorce when personal service cannot be made, "an attested copy of the summons shall be printed in the Government Gazette and Ke Au Okoa at least six times," &c. In the present case the publication was not in either of those papers but was in the "Evening Bulletin" and the "Ke Aloha Aina." This is practically all that appears in the record that is material to the present question. It does not appear why the publication was not made in the papers named in the statute. If this were all that we could consider, there would seem to be no question as to the correctness of the order excepted to.

Service by publication was unknown to the common law. It exists only by statute and so cannot be made except as permitted by statute. Such statutes, being in derogation of the common law, are strictly construed. All courts agree as to this. *Galpin v. Page*, 18 Wall. 350, 362. Accordingly, when the statute expressly provides that the publication shall be in certain specified newspapers, it cannot be made in entirely different ones. The trial judge cannot make statutory law, much less can he repeal or amend existing statutes.

It is argued, however, that publicity is the object of the statute and that that object is effectuated by publication in other newspapers as well as by those named in the statute. But not only does it not appear that as wide publicity would be given by publication in the papers in question as in the papers named by the

Legislature, but, conceding that such would be the case, the judge could not depart from the plain terms of the statute and thereby not only in effect repeal or amend the statute but authorize in the absence of statute what can be authorized only by statute. There are numerous cases in which attempted services by publication have been held void because of departure from the plain terms of the statute, although under circumstances that would seem to indicate that as great publicity would be given as if the statute had been complied with. Further, publicity in the sense of making known to the public generally is not the main purpose of the statute. So far as publicity is the object it is chiefly with a view to reaching the party defendant whose rights may be affected. And yet it is held that the statute must be strictly complied with, on the one hand however probable or even certain it may be that the notice cannot reach such party in time to enable him to respond, if at all, or on the other hand even though he has actual knowledge or personal notice of the proceedings though not in the manner prescribed by law. See *Lishman v. Perry*, 7 Haw. 266; *Vizzard v. Taylor*, 97 Ind. 90; *Otis v. Epperson*, 88 Mo. 131; Wade, Notice, Sec. 1030. Moreover if the statute permits publication in certain papers only, that would tend to lead people to look for such notices in such papers only.

The difficulty in this case, however, arises, not from what appears on the record, but from what it is taken for granted the court knows or is supposed to have judicial knowledge of, to the effect that the papers named in the statute, not many years after the enactment of the statute, not only ceased to be controlled by the Government, if they were so controlled when the statute was enacted, but ceased to exist under the names set forth in the statute, and that it has been the practice during much if not all of the time since for the trial judges to order publication in cases of this kind in other papers. Hence the arguments of contemporaneous and continuous construction and hardship are urged.

We are not aware that any one ever doubted that strict compliance with the statute was necessary so long as the papers

named therein were under the same control and bore the same names as when the statute was enacted. Nor do we know how long after that change occurred it was that a departure from the statute began to be made. We believe that for some time at least the publication continued to be made in papers which there is some reason to believe were the same papers though published under different names, viz: the "Hawaiian Gazette" and the "Kuokoa." If so, there is much ground for argument that such service was a sufficient compliance with the statute. See *Sage v. Central R. R. Co.*, 99 U. S. 334; *Perkins v. Keller*, 43 Mich. 53; *Wilkerson v. Eilers*, 114 Mo. 245; *Reimer v. Newel*, 47 Minn. 237; *Isaacs v. Shattuck*, 12 Vt. 668. This is on the theory that the newspapers designated by the statute continued to be the same newspapers, just as a person or corporation would continue to be the same person or corporation, notwithstanding a change of name. And yet it was held in *Bussey v. Leavitt*, 12 Me. 378, that the notice was insufficient where the statute required publication in the newspaper of the public printer to the state, and such paper namely, the "Portland Advertiser and Gazette of Maine," had ceased to be the public newspaper of such printer. And since the statute of 1892 (Civ. L. Sec. 1153), as we recently held in *Winslow v. Winslow. ante*, 498, notices in cases of this kind could be published in any newspaper selected by the party or his attorney, provided they were published in the appropriate languages and had been shown to and declared by the Supreme Court to be newspapers of general circulation. But in the present case the papers were neither continuances under different names of the papers mentioned in the statute nor such as were selected by the libellant or her attorney or shown to or declared by the Supreme Court to be of general circulation. Just how many divorces have been granted by the trial courts under circumstances like the present we do not know. Counsel in his brief enumerates eleven such cases heard by four different Circuit Judges during the last four years. We presume there were others in previous years. What the result will be in respect of such cases—as to property rights, legitimacy of children, liability to criminal prosecution, &c.—if we do not

uphold the jurisdiction in cases of this kind when there has been no service such as is required by the statute, we cannot say. The Legislature could doubtless by further legislation prevent or cure some of the results, and we can only hope that the others will not prove of great consequence. We should gladly uphold the jurisdiction if we could. But neither of the arguments made, nor any other that occurs to us, would warrant us in doing so. The argument of hardship, while it would be sufficient to cause us to lean one way in a case of doubt, does not authorize us to legislate when there is no doubt. The argument of contemporaneous and long continued construction also, assuming that the departure from the law was contemporaneous and sufficiently long continued, does not apply in cases like the present where the statute is explicit and does not admit of construction. To uphold the jurisdiction in this case would require us to hold in effect—that not only in divorce cases but in all cases in which service by publication may be authorized by a statute, the trial judge may use his discretion and allow service by publication in a manner contrary to the statute, if there is a statute, or in such manner as he pleases, if there is no statute. But that would be contrary both to previous decisions of this court and to the unanimous opinions of other courts. In former years Circuit Judges not infrequently distributed estates on petitions and notices for appointment of administrators, and distributed real estate as well as personal estate on final distribution, but this court has not upheld the exercise of such jurisdiction. *Kailianu v. Lumai*, 8 Haw. 508; *Smith v. Hamakua Mill Co.* 13 Haw. 245. There are some questions so well settled and so fundamental and far reaching in their nature as not to be overturned by the error even of a number of Circuit Judges for a period of years. The case is practically the same now as it would be if the newspapers specified in the statute had not ceased to exist under their former names. If the statute could not be departed from when there were papers that answered the description in the statute, the cessation of those papers could not confer jurisdiction to do so thereafter. To hold otherwise would be not only to go counter to the current of decisions both here and

elsewhere but also to open the way for the perpetration of injustice in future cases by permitting them to be heard and determined without legal notice to interested parties.

The exception is overruled and the order excepted to affirmed.

T. McCants Stewart for libellant.

A. S. Humphreys, amicus curiae.

HAWAIIAN COMMERCIAL AND SUGAR COMPANY,
LIMITED v. TAX ASSESSOR AND COLLECTOR.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

SUBMITTED JANUARY 5, 1903. DECIDED FEBRUARY 19, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The value of sugar mills, buildings and a plantation railroad discarded on account of the erection of larger mill at a different location and the construction of a different railroad connected therewith, is not a loss "actually sustained during the year incurred in trade, or arising from loss by fire not covered by insurance, or losses otherwise actually incurred," and cannot be deducted in computing the net income of the plantation subject to taxation under the Income Tax law of the Territory. (Act 20, Session Laws, 1901).

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal by the Tax Assessor of the 1st Taxation Division of the Territory from the decision of the Tax Appeal Court sustaining the contention of the Hawaiian Commercial and Sugar Company, Limited, a corporation, in making certain deductions from its gross income as "losses" incurred in business under the Territorial Income Tax law, Act 20, Session Laws, 1901, for the year preceding July 1st, 1902.

The return having been prepared in the principal office of the company at San Francisco, California, shows a gross income for the period of \$1,821,022.48 and deduction of \$1,830,075.43 and

loss of \$9,052.95 and no taxable income for the year. Included in the amount deducted was \$270,444.72 that the assessor claimed was not properly a "loss" and was subject to the tax under the law. This amount as found by the Tax Court and allowed to be deducted from the gross income as "losses otherwise actually incurred" was composed of three items:

"For loss on Old Mill and Mill Buildings.....				\$150,749.52
"	"	"	" Buildings	10,000.00
"	"	"	" Railroad property	109,695.20
				<hr/>
				\$270,444.72

It appears that the Hawaiian Commercial and Sugar Company, Limited, is the owner and operator of an extensive sugar plantation located on the Island of Maui, in this Territory; that the plantation has been in successful operation since 1878 and is and has been fully equipped with sugar mill, plantation railroad and all the appliances necessary to the operation of such an estate; that in recent years, under the present management, the area of cultivated land has been extended and the output of the plantation greatly increased; that it was deemed necessary by the management to erect a new and larger mill at a more central location on the plantation and to construct a new railroad capable of sustaining increased traffic; that a new mill was erected at a different location and a new standard gauge railroad was constructed—the old railroad being a narrow gauge was inadequate to meet the demands of transportation on the plantation; that the old mill and railroad were operated and in good condition until the new mill was started about January 29, 1902, and some of the machinery of the old mill, valued at about \$90,000.00 was used in the equipment of the new and about \$12,000.00 in addition was realized from the sale of other property from the old mill and about \$15,000.00 dollars was realized from sale of railroad property; and all of the buildings of the old mill and the balance of the machinery of the mill and railroad is practically worthless, but it does not appear how long the mill building and railroad had been in use; that it would cost to equip a new mill and railroad such as that abandoned

something like \$850,000.00 and that as is estimated very little more will be realized from the balance of this property and the Tax Court found that it is a loss as complete as "if it had been destroyed by fire" and that the loss was occasioned by "business necessity;" that it was business prudence and forethought that caused new improvements to be made to meet the increased production and that the loss occasioned by the necessity of abandoning a part of the old property was a "loss otherwise actually incurred" in connection with the business within the meaning of Section 4 of the Income Tax law and allowed the deduction as claimed.

The evidence clearly established the fact that these changes made on the plantation caused an abandonment of a great deal of property but the question presented by the appeal is, Was this a loss within the meaning of the Income Tax statute authorizing certain enumerated losses to be deducted?

Section 2 of the Act prescribes that "there shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of *two per cent.* on the net profit or income above actual operating and business expenses, from all property owned, and every business, trade, employment or vocation carried on in the Territory of Hawaii, of all corporations doing business for profit in the Territory," etc.

Section 4 reads in part: "The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund or account, or carried to the account of any fund or used for construction, enlargement of plants, or any other expenditure or investment paid from the net annual profits made or acquired by said corporation. In computing incomes, the necessary expenses actually incurred in carrying on any business, trade, profession or occupation or in managing any property, shall be deducted, and also all interest paid by such corporation on existing indebtedness. * * * also all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred. Provided, that no deduction shall be made for any amount paid

for new buildings, permanent improvements or betterments made to increase the value of any property or estate."

The Tax Court relied on the case of *Grant v. Hartford & N. H. Ry. Co.*, 93 U. S. 225, in support of its judgment. In that case the question arose under the U. S. Income Tax Law of 1864. The assessor claimed that \$55,712.60 used by the railroad company in the construction of a new stone bridge over a river to replace a cheap and unsafe wooden bridge was fairly to be regarded as "profits used in construction" within the meaning of section 122 of that statute and taxable as income. The court after stating that the company having returned their gross earnings over and above current expenses for the period and paid the tax thereon, had fully complied with the law, say "The object of the law was to impose a tax on net income, or profits, only; that that cannot be regarded as net income, or profits, which is required and expended to keep the property up in its usual condition proper for operation. Such expenditure is properly classed with repairs, which are a part of the current expenses. If a railroad company should make a second track where they had but a simple track before, this would be a betterment or permanent improvement, and, if paid for out of the earnings, would be fairly characterized as 'profits used in construction.' The works of the company would have an additional value to what they had before, with an increased capacity for producing future profits. This kind of expenditure is what Congress meant to reach." It is admitted that the new mill and railroad enhance the value of the plantation and increase its capacity for producing future profits. This admission brings the case squarely within the rule above announced and condemns the decision of the Tax Court. After the construction of the new mill and new railroad the company had two mills and two railroads. The fact that it had use for only the new mill and new railroad and voluntarily abandoned the old ones does not make the value or cost of replacing the abandoned property a "loss" and deductible from the taxable income under this law.

A case more nearly analagous to that at bar is *Caltness Iron Company v. Block*, 6 L. R. App. Cases, 315, 324, 325, wherein

the House of Lords affirmed the judgment of the lower court in refusing to permit a deduction from income taxable under the Income Tax law of England, of an amount claimed by a coal company expended during the year in digging pits, necessary to reach the deposits of coal, which became useless during the year by reason of the exhaustion of the coal reached by such pits. Lord Penzance said: "The words 'profits received therefrom,' in this connection, means, I think, the entire profit derived from the 'mine,' deducting the cost of working it, not the cost of making it" and gave the following illustration of the principle: "A pit sunk to approach the mineral underground is not unlike a road made above ground, from the pit's mouth to the highway, as a means of transporting the mineral to the market. If a man were possessed of such a mine and such a road, it would be true that as the mineral was gradually worked out, the road and the capital involved in making it, would gradually be exhausted and lost; but the decaying character of the property would not make it the less subject to be taxed, according to its value or the profit obtained by using it, as long as the mineral lasted." p. 327.

The digging of new pits as the coal reached by the old ones became exhausted, was a "business necessity" on the part of the coal company as much as the erection of a new mill and the building a new railroad on the part of the Hawaiian Commercial and Sugar Company when the old ones became inadequate to answer the demands of the plantation. The money expended in making the pits that had become useless was as effectively "lost" as that expended in the old mill, buildings and railroad rendered useless by the substitution for them of the new and modern appliances.

The word "loss," and its plural "losses," used in the statute is not a technical term of art or trade but a simple word in common use. There is nothing to indicate that these words are used in the statute to express any other than their ordinary meaning. The dictionary definition of the noun, "loss," is "failure to hold, keep, or preserve what one has had in possession; deprivation of that which one has had; as the loss of money by gaming;

loss of health or reputation; loss of children; opposed to gain." (Cent. Dic.) The central idea in each of these definitions is involuntary parting with a thing. If property is lost it has passed from the control and out of the possession of the loser. No one can lose property and still have it in his possession and be conscious of the fact that he has it. There is a difference between lost and abandoned property, still the actual loss to the owner may be the same in each case. It cannot be seriously contended that if a person voluntarily abandons property the value or original cost of such property is a loss within the intention of the Income statute.

The evidence also shows that there were two mills in the old buildings and that one of them was not in use at the time of the completion of the new mill but it does not appear what was the value of the unused mill nor when it ceased to be used. Even on the theory of the Tax Appeal Court the loss for this unused mill, whatever it was, occurred when its use ceased and could not now be deducted as a loss unless it was shown that it was abandoned during the year for which the return is made.

When the new mill and railroad came into use the old mill, building and railroad did not part company with the taxpayer, but were still in its possession and control. This property had not been consumed "by fire" or lost "as a ship at sea." If it did not possess the same value to the company as before, it was for the reason that it had become useless since better appliances had taken its place. If the Hawaiian Commercial and Sugar Company, Limited, had used the property or had needed its use and been able to make the same use of it as formerly the property would have been of the same value, after as before the substitution of the new appliances, but since the company no longer needed the use of the property, from its view point, there was depreciation in its value and great "loss." This was not a loss however, "actually sustained during the year incurred in trade," or by fire, or "otherwise actually incurred," within the meaning and intent of the statute.

Advance in the price of property cannot be taken into account in estimating "net income" subject to taxation, for any particu-

lar year, under an income tax law. *Gray v. Darlington*, 15 Wall. 63. The converse of this proposition follows that depreciation in the value of property cannot be considered for like purposes.

We are of opinion that the Tax Appeal Court was in error in its decision and that the same ought to be reversed and that the net income of the Hawaiian Commercial and Sugar Company subject to taxation for the period ought to be fixed at \$291,675.81. It is so ordered.

Smith & Lewis and *L. J. Warren* for Hawaiian Commercial & Sugar Co., Ltd.

Robertson & Wilder for Assessor.

JESSE MAKAINAI v. GOO WAN HOY.

JESSE MAKAINAI v. GOO WAN HOY.

APPEALS FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED JANUARY 8, 1903.. DECIDED FEBRUARY 19, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The War Revenue Tax law of 1898, (30 U. S. St. L. p. 452) being operative in this Territory, it was not error for a District Magistrate to refuse to render judgment on a promissory note not stamped as required by that statute.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff commenced separate suits in the District Court of Honolulu on two promissory notes bearing date, January 10, 1901, one due in six and the other in twelve months after date, executed by the defendant and payable to the plaintiff for the sum of \$250. The District Magistrate found in one case that the note sued on was not "properly stamped" as required by the

United States Internal Revenue Law of 1898, and in the other the finding was that the note was not "properly stamped" and that the stamps on the note were not "properly cancelled" and gave judgment in each case for the defendant for costs and attorneys' commission. The plaintiff appealed on points of law. The two cases involving the same point were argued and submitted together.

The stamps attached to each of the notes were sufficient in amount but those attached to one note bore cancellation, "Bishop & Co., Jan. 12, 1900," a date almost one year prior to the date of the note, and on the other note the stamps were cancelled by cross mark of pen and ink without date or initials.

It does not appear whether the District Magistrate found that the failure to "properly stamp" and "properly cancel" the stamps was due to an intention to avoid the payment of the tax and defraud the government of the revenue or was an omission arising from carelessness or ignorance, or whether he found that the notes were "invalid and of no effect" under Section 13 or were merely not competent evidence under Section 7 of the Act.

It is contended on behalf of the appellant that the District Magistrate acted on the theory that the notes were incompetent evidence under this Revenue law providing that no instrument not stamped as required by its terms shall be competent evidence in any court and that the rule of evidence thus prescribed does not apply to the State and Territorial Courts but is applicable only to the Federal Courts. On this one proposition the appellant relies to sustain the appeal. In support of this contention the case of *Small v. Slocum*, 37 So. E. 481, is cited, wherein the Supreme Court of Georgia passes upon the same question raised in these cases. In that case the lower court overruled an objection to the admission of a lease in evidence on the ground that it had not been stamped as required by the United States internal revenue law of 1898. In sustaining this ruling the Supreme Court said that the provision of the Act prescribing that an unstamped instrument "shall not be competent evidence in any court," laid down a rule of evidence for the Federal Courts; that Congress had no power to make rules of evidence

for the State Courts and that it did not appear from this Act that it was the intention of Congress to go further on this line than to prohibit unstamped instruments from being admitted as evidence in the Federal Courts; that the Federal Courts derived all their powers from Federal laws and Congress had full and complete power to legislate respecting the procedure in such courts but that as the State Courts derived all of their authority from the State constitution and laws Congress could not prescribe rules of evidence for them. It must be admitted that this decision is supported by the decided weight of authority. *Carpenter v. Smelling*, 97 Mass. 452; *Green v. Holway*, 101 id. 213; *Griffin v. Ronny*, 35 Conn. 239; *Haight v. Grist*, 6 N. C. 739; *Knox v. Rossi*, (Nev.) 48 L. R. A. 305; *Casidy v. St. Germain*, 46 (R. I.) Atl. 35.

It does not follow from this admission, however, that the appellant's contention is correct. His theory entirely overlooks the difference in the relation that the states and their courts and the territories and their courts sustain to the Federal government. The state, being an independent sovereignty within its sphere, makes its own constitution and laws, creates its own courts and fixes their jurisdiction; while a territory, being a political dependency under the absolute control and dominion of Congress, its organic law is made by Congress and its courts and their jurisdiction and procedure is defined by the same power. *First National Bank v. Yankton*, 101 U. S. 129; *Patterson v. Gile*, 1 Colo. 200.

In this last case the Supreme Court of Colorado, in passing on this question, said: "As a territory, we derive our political existence and every political right and privilege that we enjoy from the general government, and therefore we cannot deny the power of that government to legislate upon this subject in this way as did the Supreme Courts of Illinois and Massachusetts." * * * "We recognize the power of Congress to enact this law, and, according to the one hundred and sixty-third section of the act, we will require every instrument to be stamped according to the provisions of the act before it is used as evidence." id. p. 204.

It follows that the contention of appellant cannot be sustained and that the District Magistrate did not err in holding that the U. S. Internal Revenue law of 1898, was in force in this Territory at the time of the execution of said notes in rendering the judgment complained of.

The evidence in the record is so meager that it would be difficult to pass upon the question of "fraudulent intent," discussed at some length in brief of appellee, and since this question was not raised or pressed by appellant we do not feel called upon to pass upon it at this time.

The appeal in each case is dismissed.

Achi & Johnson for appellant.

Holmes & Stanley and *Joseph H. Knight* for appellee.

TERRITORY OF HAWAII *v.* CHEONG JIM KONG.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED JANUARY 8, 1903. DECIDED FEBRUARY 20, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The exceptions taken in this case to the verdict, to overruling motion for new trial and to refusal to give instruction, not presenting any prejudicial error, are overruled.

OPINION OF THE COURT BY GALBRAITH, J.

At the June, 1902, term of the Circuit Court of the Second Circuit, the defendant and six others were indicted on the charge of assault and battery on a public officer in the discharge and execution of his duty, under section 61, Penal Laws. All were acquitted by the jury except the defendant. He was found guilty and sentenced to one year's imprisonment at hard labor. He comes to this Court by bill of exceptions.

The offense was charged to have been committed on Sunday

the 29th day of December, 1901, at the Chinese camp on Kihei Plantation, Island of Maui.

It appears from the evidence, a transcript of which is made a part of the record by the bill of exceptions, that Santos, the officer assaulted, was, about lunch time on Sunday, December 29th, at the Chinese camp of the plantation and heard a noise in the Chinese dining room; that he immediately rushed in through the open door and saw, as he claimed, these Chinamen gambling with cards; that as soon as the Chinese saw him they began to scatter; that some jumped out of the window and others escaped through the door; that he "grabbed" four of them and pulled them out of the house; that two of these were docile and made no resistance; that two, one of whom was the defendant, Jim Kong, resisted and succeeded in breaking away; that the defendant called to his fellow countrymen to come and assist in rescuing the two held by the officer; that when some distance from the building over near the railroad the defendant and his associates threw stones at the officer and the defendant struck him with a club and succeeded in rescuing the two Chinamen; that the disturbance developed into something of a riot but subsided on the arrival of assistance and later in the day the defendants were arrested and taken to Wailuku; that the officer was not seriously injured and had no warrant for the arrest of the defendants; that in attempting to make the arrest he did not declare that he was a peace officer but said that he arrested them for "gambling on Sunday;" that the assault and battery was committed some time after the attempted arrest.

The court in its charge to the jury quoted the statute defining the offense of "assault and battery on a public officer" and also the definition of "assault" and of "assault and battery" and then gave a general instruction about the jury being the sole judges of the evidence and the weight and credit to be attached to it, etc. The defendant asked two instructions one of which was given and the other was not a correct statement of the law and was properly refused. While the charge of the court is not what it should have been the defects in it are not raised by the exceptions and cannot be reviewed at this time.

There are a number of exceptions embodied in the bill but it will not be necessary to consider them seriatim since only two points were urged at argument and in brief by the defendant, (1) That the officer was not in the discharge of his official duty when assaulted, (2) That the defendant did not know that Santos was a public officer and had no intention of hindering or obstructing him in the discharge of his official duty.

We assume that the jury found against the contention of the defendant on each of these points. The evidence is ample to sustain such finding. It is possible, at the time of the attempt to make the arrest in the eating house, that the defendant did not know that Santos was a policeman, but want of such knowledge cannot be claimed for him at the time of the assault near the railroad track. Prior to that time he had escaped from the officer and had rallied his countrymen for the purpose of rescuing the two Chinamen from custody. The officer was sounding his police whistle, and calling for help, and the assault, apparently, was committed with the intent to obstruct and hinder the policeman in the discharge of his duty. No prejudicial error is presented by the bill of exceptions.

The exceptions are overruled.

J. L. Coke and Kinney, McClanahan & Bigelow for appellant.

Jno. W. Cathcart, Deputy Attorney-General for Territory.

JOHN D. PARIS *v.* J. A. MAGOON, Administrator of the
Estate of A. Fernandez, deceased.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 8, 1903. DECIDED FEBRUARY 24, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A decree dismissing a bill for the specific performance of a contract is not a bar to a subsequent action for damages for a breach of the

contract, when it appears that the question of damages was not raised in the former suit and that the decree was not based on any ground that showed there was no right of action under the contract.

An administrator may be liable in damages for a breach of contract occurring before the death of his decedent, even though the contract is of a nature personal to such decedent.

OPINION OF THE COURT BY FREAR, C.J.

Of the many exceptions taken only those that have been argued will be considered.

The first exception is to the overruling of the defendant's plea of *res adjudicata*. This is an action for damages against an administrator for a breach by his decedent of a contract for the sale of cattle and leases constituting a ranch. It is contended that there can be no recovery in this action for damages because this matter was adjudicated in a former suit in equity for specific performance. It does not appear that there was any prayer for damages or adjudication of the question of damages in that suit as a mode of relief either incidental or alternative to that of specific performance. In that suit the Circuit Judge denied specific performance of the portion of the contract relating to the cattle but granted it as to the leases, but on appeal this Court reversed the decree, holding that there could be no specific performance as to the cattle because the method of ascertaining the amount to be paid for them involved personal acts of the vendor and the vendor had died, and that there could be no specific performance as to the leases because the contract was entire and the agreement as to the leases alone was a minor part of the contract. *Paris v. Greig*, 12 Haw. 274. The contention seems to be that this matter of damages must be regarded as concluded by the decree in that suit dismissing the bill, on the principle that a decision is decisive not only of everything that was litigated but also of everything that might have been litigated in the case. This question was gone into so fully in *Haw. Com. & Sug. Co. v. Wailuku Sug. Co. ante*, 50, that it will be unnecessary to consider it at length here. Suffice it to say that that principle applies to intermediate matters, whether litigated

or not, so far as the ultimate matter decided is concerned and not either to intermediate matters or to other ultimate matters not in fact litigated. If the bill in the former suit had been dismissed because there was no contract or for any other reason that showed that there was no right of action at all, or if the matter of damages as a question of alternative relief had been litigated and decided the case might be different. Even if damages had been prayed alternatively, but the court had declined to go into that question it would not be *res adjudicata*. That the mere dismissal of a bill for specific performance, at least where as here it affirmatively appears that the question of damages was not raised at all, does not bar an action for damages for a breach of the contract, seems to be generally acknowledged. 1 Story, Eq. Juris. Sec. 769; 2 Van Fleet, Form. Adj. 886; Pom., Contr., Sec. 475; *Ballou v. Billings*, 136 Mass. 307; *Vawter v. Bacon*, 89 Ind. 565; *Smith v. Shepherd*, 36 Ia. 253; *Renner v. Sharp*, 23 N. J. Eq. 274; *Beck v. Allison*, 56 N. Y. 366. The case of *Stickney v. Goudy*, 132 Ill. 213, relied on by the defendant, also supports this view.

The next exception was to the admission in evidence of the contract for the alleged breach of which the action was brought. The grounds urged in support of the objection to this evidence were stated in various ways but in substance they all amount to this, that the performance of the contract, particularly with reference to the ascertainment of the amount to be paid for the cattle, depended on the personal act of the vendor and that, since he died before that amount was ascertained, there can be no right of action against his administrator, in other words, that the contract died with him. The answer to this is that the action is not brought for a breach that occurred after the vendor's death, but for a breach alleged to have occurred before his death. See *Paris v. Greig*, *supra*, at page 283. The price for the cattle was to be ten dollars a head for all that were over one month old and that were strong and healthy. They were to be driven by the vendor and counted by both vendor and vendee. They were so driven and so counted to the number of 964 and then turned out. The vendor claimed that there were four

hundred more undriven. The vendee conceded that there were one hundred more, which he would pay for without a further drive, and offered to pay for the whole alleged four hundred more without a further drive if the vendor would guarantee that number. The vendor declined to guarantee that number or to make a further drive. The plaintiff in this action waived all damages as to cattle over the number, 964, actually driven and counted.

The only remaining exception relied on was to the refusal to direct a verdict for the defendant because the plaintiff had not tendered to the vendor the expenses of a second drive. We are unable to perceive on what theory such a tender was required.

The exceptions are overruled.

Kinney, Ballou & McClanahan for plaintiff.

J. A. Magoon and J. Lightfoot for defendant.

THE TERRITORY OF HAWAII *v.* WONG SHUI KING.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 20, 1902.

DECIDED MARCH 17, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

On appeal from a conviction by a District Court of the offense of libel in the second degree, the defendant moved in the Circuit Court, before trial, for a discharge for the want of a sufficient complaint. The alleged libellous article was set out in the complaint with certain innuendoes. A part of the language of the article was admittedly libellous *per se*. Held, that the motion was properly denied, even assuming that the remainder of the language used was libellous only when read in the light of extrinsic facts and that there were no sufficient averments of such extrinsic facts and no *colloquia* connecting the language with such facts.

The article named the person libelled by his proper name. Held, that the allegation in the complaint that the alleged libellous language was used of and concerning the complainant was a sufficient *colloquium*.

In a prosecution for libel under Chapter 32 of the Penal Laws it is not a ground for discharge that no witness other than the complainant testified that he understood that the alleged libellous language was used of and concerning the complainant. That fact, if essential to be proved, may be found by the jury from other evidence.

Held, that in this case there was testimony of witnesses other than the complainant as well as other evidence sufficient to support a finding that the article in question was understood by those who read it and who knew the complainant and the circumstances surrounding him as referring to him.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

In the District Court of Honolulu, the following charge was entered against the defendant and two others:

"Poon Kwai Leung, of Honolulu, Island of Oahu, being duly sworn says:

"That Wong Shui King, Sze To Yook and Won Kow, being persons of envious and evil and wicked mind, maliciously, wickedly and unlawfully contriving and intending to injure, oppress and vilify one Poon Kwai Leung, this affiant, and to bring him into contempt, scandal, infamy and disgrace, on the 23rd day of September, in the year of our Lord, nineteen hundred and one, at Honolulu, in the Island of Oahu, in the Territory of Hawaii, did falsely and maliciously print and publish and cause and procure to be printed and published in a certain newspaper then and there printed and published in the Chinese language, called the Sun Chung Kwock Bo, a certain false, scandalous, malicious and defamatory libel, containing divers false, scandalous, malicious and defamatory matters of and concerning the said Poon Kwai Leung, according to the tenor following:" (Here is inserted a copy of the alleged libellous language in Chinese) "which being translated into the English language

were and are the same signification and meaning as the English words following:

“ ‘At the present time men’s minds are not as they were in ancient times. But as a snake tries to devour an elephant it cannot compare with Poon Kwai Leung (meaning that said Poon Kwai Leung, this affiant, is not as honest as the men of ancient times and that said Poon Kwai Leung, this affiant, is endeavoring to gorge himself and fill his, said Poon Kwai Leung’s, pockets with other people’s money in a dishonest, fraudulent and reprehensible manner). Why is this? I will now narrate about this person (meaning said Poon Kwai Leung, this affiant) so that the numerous friends (meaning the Chinese people) and virtuous men can judge whether it is accordingly, or otherwise. This person (meaning Poon Kwai Leung, this affiant) has not been in Honolulu very long and depending on the support of Consul Yang (meaning Yang Wei Pin, His Imperial Chinese Majesty’s Consul at Honolulu) was nominated to attend to the claims of various friends in this city (meaning that the said Poon Kwai Leung, this affiant, had been appointed by said Yang Wei Pin, as such Consul, to prepare and attend to claims for losses sustained by Chinese residents of Honolulu, aforesaid, by reason of certain fires originated and started by and under the order and authority of the Board of Health, in suppressing the alleged bubonic plague, during the months of November and December, A. D. 1899, and the months of January, February, March and April, A. D. 1900, before the Fire Claims Commission of the Territory of Hawaii). This is just the same as ‘He has prepared a sword to slay people before he has ascended the throne,’ exactly as what was done by Mew Chin and Lau Ching Yin (meaning that Poon Kwai Leung, this affiant, had, previous to his appointment by the said Yang Wei Pin, Consul as aforesaid, intended and designed to swindle and defraud the claimants for losses sustained by reason of the fires originated and started as aforesaid.

“ ‘But as regards the cases which have been heard in the near past (meaning such claims for losses sustained by reason of the

fires originated and started as aforesaid which have been recently heard by said Fire Claims Commission) some of the various friends (meaning the Chinese people) may have been in the country towns and some at Ewa, Waianae, Waialua and Koolau, and when they heard of the hearing they strove to get first for fear that they would be left behind and came to the city to wait for the hearing.

“ ‘But unexpectedly he (meaning Poon Kwai Leung, this affiant) was only taking care to fill his (meaning Poon Kwai Leung’s, this affiant’s) pocket. Those (meaning such claimants) who gave him (meaning Poon Kwai Leung, this affiant) money, were summoned to be heard very quickly and those (meaning such claimants) who had no money to give him (meaning Poon Kwai Leung, this affiant) were delayed for a long time, simply seeking to waste their time (meaning to charge thereby and did charge thereby that Poon Kwai Leung, this affiant, was guilty of bribery and of accepting bribes to advance and expedite the hearing and consideration of causes before a court of record of the Territory of Hawaii.)

“ ‘In my opinion Consul Yang (meaning said Yang Wei Pin) has fleshy eyes without eyeballs (meaning that said Yang Wei Pin was sightless and blind and without judgment) to appoint this man (meaning Poon Kwai Leung, this affiant) to attend to this matter (meaning the claims for losses aforesaid) and thus waste the time of all friends (meaning the Chinese people).

“ ‘Besides he (meaning Poon Kwai Leung, this affiant) receives a salary of two hundred dollars per month. What ability has this man (meaning Poon Kwai Leung, this affiant) to receive such a salary? If you inquire into this person’s (meaning Poon Kwai Leung’s, this affiant’s) ability there are in this city innumerable persons with such ability (meaning to charge thereby and did charge thereby that this affiant, Poon Kwai Leung, was incompetent and incapable of filling the position to which he had been appointed by said Yang Wei Pin).

“ ‘But in attending to this matter if he (meaning Poon Kwai Leung, this affiant) acted honestly, the claimants would be satis-

fied if he (meaning Poon Kwai Leung, this affiant) received even a little more than two hundred dollars salary (meaning to charge thereby and did charge thereby that said Poon Kwai Leung, this affiant, was dishonest and fraudulent and had dishonestly and fraudulently obtained a large sum of money from said claimants in addition to the salary which was paid to him by said Yang Wei Pin for his services).

“ ‘As regards this man’s (meaning Poon Kwai Leung’s, this affiant’s) conduct, I do not blame Wong, Fong and Ng for stating in their article published heretofore that he (meaning Poon Kwai Leung, this affiant) is one of those who have unconscientious hearts and one of a class that blackmails peoples by false representations.

“ ‘I hope that friends (meaning the Chinese people) who have fire claims will be on the alert and bear in mind not to enter his (meaning Poon Kwai Leung’s, this affiant’s) trap.

“ ‘I purposely publish this for public information.

“ ‘Dated this 2nd day of September, A. D. 1901.

Yours truly,

Won Kow, Writer.’

“Which said false, scandalous, malicious and defamatory libel the said Wong Shui King, Sze To Yook and Won Kow did then publish to the great damage, scandal and disgrace of the said Poon Kwai Leung, this affiant, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the people of the Territory of Hawaii.”

The defendant was convicted of the offense of libel in the second degree and sentenced. From the judgment of the District Court an appeal was taken to the Circuit Court of the First Circuit. The jury also rendered a verdict of guilty of libel in the second degree. During the course of the proceedings had in the Circuit Court a number of exceptions were noted by the defendant and later incorporated into a bill, but of these four only are now relied upon. They are, (1) to the denial of a

motion to discharge for want of a sufficient complaint, which motion was presented before the trial, (2) to the denial of a motion, made at the close of the case for the prosecution, "that non-suit be entered on the ground that there has been no proof of the innuendo laid in the complaint connecting the complaining witness with the publication complained of, (3) to the verdict, as being contrary to the law and the evidence and the weight of the evidence, and (4) to the overruling of a motion for a new trial based on the same alleged errors. In support of the motion to discharge it is argued that the language complained of, with but one exception is not libellous *per se* but becomes libellous only when read in the light of extrinsic facts, that the charge contains neither averments of such extrinsic facts nor *colloquia* connecting the words used with such facts, and that the innuendoes alone cannot add to the meaning of the language in question. Whatever the law may be on this subject,—much of it would seem to have been settled in the case of *Prov. Gov't. v. Smith*, 9 Haw. 257—the fact remains that, as conceded by counsel for the defendant, a part of the language complained of (this is the exception just referred to) is in itself libellous. "As regards this man's conduct, I do not blame Wong, Fong and Ng for stating in their article published heretofore that he is one of those who have unconscientious hearts and one of a class that blackmails peoples by false representations." These words are unambiguous. There is no room for construction. Neither averments of extrinsic facts nor *colloquia* are needed to make their meaning plain. They are within the statutory definition of a libel (Section 299, Penal Laws), for they are such as, if false, directly tend to injure the fame, reputation and good name of another person and to bring him into disgrace, abhorrence, odium, contempt or ridicule, or to cause him to be excluded from society."

It is further contended with reference to the last quoted portion of the article that the charge contains no averment or *colloquium* showing that the words apply to the Poon Kwai Leung who is the complainant, and also that it does not appear from the article itself whether "this man" who is said to be "one

of a class that blackmails" refers to the Poon Kwai Leung therein mentioned or to "Consul Yang." Taking this last contention first and assuming (the view most favorable for the defendant) that this question of construction was one to be finally determined by the jury, we can simply say that the words "this man" as used in the article are at least capable of the construction that they refer to Poon Kwai-Leung and not to Consul Yang. As to the other, the charge does, in our opinion, sufficiently set forth that the complainant is the one of whom the alleged libellous words were used. See *Miller v. Parish*, 8 Pick. 383, 385; *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 296. The complaint is in part as follows: "Poon Kwai Leung, of Honolulu, Island of Oahu, * * * says: that Wong Shui King * * * maliciously * * * intending to injure, oppress and vilify one Poon Kwai Leung, this affiant, and to bring him into contempt, * * * did maliciously print and publish * * * a certain false * * * libel, containing divers false, scandalous, malicious and defamatory matters of and concerning the said Poon Kwai Leung, according to the tenor following: * * * which said * * * libel the said * * * did then publish to the great damage, scandal and disgrace of the said Poon Kwai Leung, this affiant." The *colloquium* is in the technical phrase often employed, "of and concerning." The allegation is of the fact; the evidence supporting the allegation need not be recited in the complaint.

The technical objection to the motion for non-suit, that such a motion cannot properly be made in a criminal case, need not be passed upon. What has been said on the first point concerning averments and *colloquia* to show the libellous meaning of those portions of the article which might otherwise be deemed ambiguous or not libellous on their face, applies equally to this branch of the case. The only other points made by counsel are that no evidence was adduced tending to show that any person other than the complainant read the alleged libellous language and understood it to refer to the complainant and that the evidence adduced was insufficient to support a finding that the language was used of and concerning the plaintiff.

There was ample evidence tending to show that at the date in question the newspaper "Sun Chung Kwock Bo" was one of general circulation in Honolulu and on the other islands and that in its regular issue of that date the article complained of appeared.

The complainant testified that he was the Poon Kwai Leung referred to in the article. He also gave testimony tending to show that at the date of the publication he was interpreter and translator for the Chinese Consul in Honolulu, that prior to that time he had been appointed "to take charge of the Chinese Fire Claims," that about 2668 of said claims had been presented to him, that for about 26 days he had been engaged in preparing such claims for the claimants, and that his salary for a part of the time was \$200 a month. The portion of the article translated in the complaint as meaning "the claims" (of various friends) was testified to by some of the witnesses for the prosecution as meaning "the fire claims." We think that there was sufficient evidence to support the finding of the jury that the Poon Kwai Leung referred to in the article was the complainant.

It is immaterial that those who did not know the plaintiff did not understand that the libel referred to him. Whether or not those who did know him, his occupation and other circumstances surrounding him and who read the article, would so understand it, is a question of fact to be determined by the jury, but for its determination the direct testimony of those who read it is not essential. Other evidence may suffice for the purpose. Where, as in this case, the person libelled is referred to by his proper name and his occupation and salary are stated, and evidence is given by the complainant of facts tending to show that such description applies to him, a finding by the jury that the article did refer to him and that it would naturally be so understood by those who knew him, can not be set aside as being contrary to the evidence. In such a case, the elements of the statutory offense that the words must be such as "directly tend to injure" the complainant's fame and good name "and to bring him into contempt" and that the publishing of a libel

is the maliciously putting of it into circulation "and thereby in fact making it known to others," are sufficiently proven.

Moreover, can it be correctly said that no witness other than the complainant testified that he had read the article and that he understood it to refer to the complainant? Choo Ho, the editor of a Chinese newspaper, after testifying that he had received, as usual, a copy of defendant's paper of September 23, 1901, in exchange, was asked: "Now was there any article in this issue that you saw at that time, about Poon Kwai Leung?" to which he answered, "Yes, Sir." He then proceeded to translate the article in question, and after concluding was asked by counsel for defendant, "Is what is said in that article true?"

A. "Yes, Sir." Q., on re-direct: "Did you mean to testify that the article about Poon Kwai Leung was true?" A. "Yes,

Sir." Q. "Are the matters and statements in that paper true?"

A. "No." Yet Kai, editor of a Chinese newspaper, was thus examined: Q. "Do you get copies" (of the Sun Chung Kwock Bo) "in exchange for that of your paper?" A. "Yes, Sir." Q.

"On Sept. 23, 1901, did you get copies of that?" A. "Yes, Sir. I have kept that." Q. "Do you remember if there was any

article in the paper about Poon Kwai Leung?" A. "Yes, Sir."

Lin Chin Chow, another witness for the prosecution, answered in the affirmative the question, "Do you remember seeing in it" (the Sun Chung Kwock Bo of Sept. 23, 1901) "an article about Poon Kwai Leung?"

The foregoing testimony, while capable of the construction that the witnesses understood by the words Poon Kwai Leung simply the Poon Kwai Leung mentioned in the article irrespective of any thought as to the particular individual intended, is nevertheless, in view particularly of the fact that the complainant was present at the trial, also capable of the construction that in the use of that name, in the questions put, reference was being made to the Poon Kwai Leung who was present in court and that the witnesses so understood the questions and answered accordingly. The interpretation of testimony is under such circumstances a matter to be passed upon by the jury, and if in this case the jury understood the witnesses named as testifying that

in the issue of the paper in question they had read an article relating to Poon Kwai Leung, the complainant, and that article was subsequently identified as the one complained of, we cannot say that the jury erred.

The motion for a new trial presents no other questions which are relied upon.

The exceptions are overruled.

W. Austin Whiting and Andrews & Andrade assisting the prosecution.

Kinney, Ballou & McClanahan for defendant.

DISSENTING OPINION OF GALBRAITH, J.

In the consideration of this case I have not been able to close my eyes to the fact, so patent on the record, that the prosecution primarily grew out of and is pressed by a feud between two rival Chinese Societies. I am not willing to dignify "the English as she is wrote" by American Chinese by holding that the publication of the ambiguous, symbolical and ungrammatical nonsense set out in the complaint constitutes a crime under the laws of this Territory and to affirm a sentence of *thirty days at hard labor* against the defendant for publishing the same.

The record bristles with evidence pointing to the conclusion that the strong arm of the criminal law was not invoked in this instance to redress a wrong against society, to restrain the enemy of private morals or private virtue, but to humiliate, harass and oppress a personal enemy. Under such circumstances, it seems to me, that an appellate court, at least, should scrutinize the record with extreme care, and ought to resolve every reasonable doubt in favor of the liberty of the subject. ,

The alleged libel was written by a room boy at a local hotel and given to his friend, the defendant, who is manager of a Chinese newspaper, the organ of the Bow Wong Society. The article was published in Chinese characters at advertising rates. The prosecuting witness is a member of the Consul's party.

To constitute the offense of criminal libel under the statute of this Territory the publication in writing, print or character,

etc., must, if false, "directly tend to injure the fame, reputation and good name of another person, and to bring him into disgrace, abhorrence, odium, hatred, contempt or ridicule, or to cause him to be excluded from society." Before the thing written or printed and published can "directly tend to injure the fame," etc., of any person it must convey a definite meaning and be capable of being understood by those versed in the writing, signs or characters in which it is given. It is scarcely necessary to cite authorities to establish the proposition that if the writing, sign or character in which the alleged libellous matter cannot be predicated upon it. It must speak in one language and convey one and the same idea to the initiated in the language employed.

ployed.

Applying this test to the publication in question the charge of criminal libel cannot be sustained. The Chinese characters used in the publication did not have a definite and understood meaning even to experts in the language. Five witnesses for the prosecution testified that they were competent Chinese and English scholars and could correctly translate from Chinese into English and no two of these translations are the same. Four of these witnesses translated the heading of the publication and each makes it read different from the other. See Yet Kai says that it should be translated, "Things are not just." Lin Chin Chow says: "Seeing things not fair." Li Cheung (the official court interpreter) says "Taking part of the injured." While Poon Quai Leong, the prosecuting witness, says, "Seeing matters are not just." The translations of the body of the article is given by five witnesses and no two of them give the same translation or exactly agree with that given in the complaint. This difference is clearly illustrated in the several translations of the only part of the publication that is alleged to be libellous *per se*. Cho Ho, the first witness who qualifies as an expert translator, gives it as follows:

"I do not blame them for having argument with him and stating he does his work dishonestly and accusing people of certain things. I do not blame Wong for having argued about this

matter stating that he has no mercy or pity, man without conscience."

The second witness See Yet Kai gives it thus:

"Three men by the name of Wong, Fong and Ng published in the paper some time ago that he has no conscience to force people by misrepresentation. The thing was not so and the man was forced to say it was so, and so this Wong, Kwong and Ng has known him before, and I hope that all friends will look out for to enter his trap, so I tell you all about this."

While Liu Chin Chow, swears that it should be translated thus:

"In regard to this man's conduct I do not blame Wong, Fong and Ng in writing argument, stating that he is one of those who have no conscience and one of those who extorts by force, and falsely accuses people. That is can be seen that Wong, Fong and Ng had experience to foresee this. I hope friends who had claims be careful and keep this in mind and not to enter his trap."

The fourth witness Li Cheung translates it in this way:

"In regard to this man's character I do not blame Wong, Fong and Ng for stating in their article heretofore that he is one of those, who has no conscientious heart and of the heart who blackmail."

And the prosecuting witness makes it read in English thus:

"But as regards this man's character or conduct I do not blame Wong, Fong and Ng for stating in their written article that he is one of those who has unconscientious hearts and one of those who blackmails people by false representations. From this it can be seen that brothers Wong, Fong and Ng can clearly foresee this. I hope that friends who have claims will bear in mind and be on the alert not to enter his trap."

Not one of these several translations agrees in every particular with that set out in the complaint and each one varies more or less from the others. From these facts the conclusion is inevitable that to each of the witnesses who read the publication it spoke a different story. How can any court find, as a matter of law, that characters capable of so many different translations

and whose meaning is so uncertain can be the subject of criminal libel? I do not believe that any court ought so to find.

If the Circuit Judge overruled the motion for non-suit made at the close of the prosecution's evidence on the ground that that was not a proper motion in a criminal case, I am inclined to agree with him and concur with the majority in overruling the exception taken thereto. However, the exception to the overruling the motion for a new trial ought to be sustained, the verdict set aside and the defendant discharged.

J. HAYASHI, Plaintiff, v. F. IWATA, doing business under the name of Kibi Shoten, Defendant, and THE PHOENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Garnishee.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 25, 1902. DECIDED MARCH 17, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A copy of a summons that does not have the impress of the seal or the signature of the clerk of the court, when issued from a court of record and delivered to a garnishee, is defective in substance. Such defect cannot be corrected by amendment.

OPINION OF THE COURT BY GALBRAITH, J.

The single exception presented by the plaintiff was to the ruling of the Circuit Judge sustaining the motion of the defendant to set aside the service attempted to be made on the garnishee.

The plaintiff commenced an action in assumpsit in the Circuit Court against the defendant, F. Iwata, doing business as Kibi Shoten, and the Phoenix Insurance Company, of Brooklyn, New York, as garnishee. It appears that summons was regularly issued and served on the defendant and an attempt was made to

serve the local agent of the garnishee. The return of the sheriff as to this service is as follows: "Served the within summons on The Phoenix Insurance Company of Brooklyn, New York, therein named as garnishee, through C. J. Hutchins, its agent, by leaving with him a true and attested copy thereof, at Honolulu, Island of Oahu, Territory of Hawaii, this 14th day of October, A. D. 1902, at 3:25 o'clock p. m. A. M. Brown, High Sheriff."

The garnishee appeared specially and presented a motion to set aside the service attempted to be made upon it on the ground that the certified copy of the summons left with its agent did not bear the impress of the seal of the court or the signature of the clerk. This motion was supported by the affidavit of C. J. Hutchins averring that he was the agent of the said Phoenix Insurance Company and the only person in this Territory authorized to receive service for it and that A. M. Brown, High Sheriff, had delivered to affiant "as and for a certified copy of said pretended original garnishment summons a certain paper, which is hereto attached and marked 'Exhibit A' and that no other or further service was made upon said garnishee in said cause." "Exhibit A," attached to the affidavit bore neither an impress of the seal of the court nor the clerk's signature.

Under the law in this Territory a summons from a court of record, such as the Circuit Court, must be issued by the clerk, "under the seal of the court," etc. Section 1217, Civil Laws, Section 1102, C. L., relative to the service of summons as amended by Act 5, Laws of 1898, reads: "Every summons issued under the seal of a court of record shall be served by the high sheriff, or his deputy, or a sheriff or deputy sheriff, upon the defendant, by the delivery to him of a certified copy thereof, * * * * * or in case the defendant cannot be found, by leaving such certified copy with some agent or person transacting the business of the defendant, or at the defendant's last place of residence."

The provision relating to garnishment is in part as follows: "Whenever the goods or effects of a debtor are concealed in the hands of his attorney, agent, factor or trustee, so that they cannot be found to be attached or levied upon, or when debts are

due from any person to a debtor, any creditor may bring his action against such debtor, and in his petition for process may request the court to insert therein a direction to the officer serving the same, to leave a true and attested copy thereof with such attorney, agent, etc. * * * and to summons such attorney, agent, etc. * * * to appear personally upon the day or term mentioned and appointed in said process for hearing the said cause, and then and there on oath to disclose whether he has, or at the time said copy was served, had any of the goods and effects of the defendant in his hands," etc. * * * Section 1710, Civil Laws.

The summons left with the garnishee's agent was endorsed under the printed words, "Garnishee Summons," "Issued at 3:10 o'clock p. m., October 15th, 1902. J. A. Thompson, Clerk," and across its face was the following certificate, "I hereby certify the within summons and annexed complaint to be true copies of the originals on file in said court, A. M. Brown, High Sheriff."

It is contended for the plaintiff (1) that the service of summons on the garnishee was sufficient; (2) that even, if it were not sufficient, it was not void but voidable merely and that leave to amend should have been allowed.

In support of the first point it is argued that the object and purpose of a summons is to inform the person to whom it is delivered of the commencement of an action, by whom, its nature and the time and place he is required to appear and answer or plead and that the signature of the clerk under the endorsement on the summons shows by whom the same was issued and that this summons left with the garnishee fulfilled all of these requirements and was good and sufficient. This argument is not sound for the sufficient reason that the copy of the summons served on the garnishee did not have two things that the statute says it should have had, *i. e.*, the impress of the seal of the court and the signature of the clerk.

The only further question is, were those defects of form merely rendering the summons voidable and subject to amendment on request or were they of substance rendering the summons absolutely void and the service of no force and effect.

The claim of right to amend the summons is not based upon our statutes of amendments but upon the broad proposition of the general and inherent power of a court over its process. Nor is it contended that if the omissions are of the substance they are subject to amendment.

The case of *Miller v. Ziegler*, 44 W. Va. 484; (also 67 Am. St. Repts. 777) is cited as a controlling authority in favor of plaintiff's contention. An examination of that case discloses that it was a suit in equity wherein an attachment had issued. A motion to quash the writ was made on the ground that the writ had not been signed by the clerk when it was delivered to the sheriff for execution. It appears that the writ had been signed when the motion was made. The court discusses the case on the supposition that the writ had not been signed by the clerk and holds that this was an inadvertence or clerical error that did not render the writ void but voidable and that the court below should have permitted an amendment under its general and inherent power to control its process. If there was any statute in West Virginia defining the requisite of process no reference is made to it nor is there an intimation that the suit being in equity the court would be more liberal in allowing amendments than a court of law should be. That case is easily distinguishable from the one at bar. That was an attachment suit, this is a garnishment proceeding and a third party is sought to be brought into court by the process—that was a suit in equity and this is an action at law wherein the plaintiff is attempting to follow a statutory proceeding without complying with the terms of the statute. In any event the reasoning of that decision does not appeal to me with such force that I am willing to follow it as a controlling authority.

In the State of Iowa the statute (Sec. 3804, McClain's Code) provides that "actions in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorneys" and this notice seems to take the place of summons in this jurisdiction. The Supreme Court there held, in a case where the service was made by delivery of a copy of the

notice without the signature of the plaintiff or of his attorney, that the court acquired no jurisdiction of the defendant. The court says in part: "It seems clear to us that, unless the copies show that the original was authenticated by the signature of the plaintiff or his attorneys the defendants were not bound to recognize it as a legal notice. They knew the notice only as shown by the copy, and surely, had the original been as these copies represented it to be, without signature, the court would have refused a default and judgment. Because of this omission it seems to us that it is clearly a case of no service." *Hoitt v. Skinner*, 99 Iowa, 360, 365, 366.

In applying the same rule the Supreme Court of Texas said: "A defendant may know that a suit has been brought against him, yet he is not bound to take action until he has been duly served with a process. He may justly conclude that the court will see that he has been duly cited before acting and hence is not presumed to know of a judgment that has been rendered against him without jurisdiction. A proceeding under a writ of garnishment is no exception to the rule. On the contrary the garnishee cannot accept service or voluntarily answer so as to affect the rights of the defendant in the original suit or judgment or that of his creditors. The writ of garnishment takes effect so as to fix a prior claim upon the fund which is sought to be reached only by the service of the writ in the manner provided by law. Until this is done the garnishee can not be in any manner affected by the suit." *Harrell v. The Mexico Cattle Co.*, 73 Tex. 612, 616.

If the attempt to serve the garnishee was not simply defective but was no service at all then it follows as a matter of course that there could be no amendment for in the latter event to allow an amendment would be to permit the substitution of service where none had been made. "This power of amendment," said Judge Choate, in *Brown v. Pond*, 5 Fed. Rep. "can only be exercised in cases where the court has acquired jurisdiction over the defendant, or he has submitted himself to the jurisdiction." In other words it is power to amend a defect in process. There must first be a process to be amended. *United States v. Turner*,

50 Fed. 734, 735. "The summons must be signed by the clerk. His signature is a matter of substance. It is a fundamental part of the summons. Without it there is no summons." *Sherman v. Huot*, 52 Pac. 558, 559. See also *Russell v. Craig*, 10 Colo. Appl. 428; *Dwight v. Merritt*, 4 Fed. 614; *U. S. v. Rose*, 14 Fed. 61.

The only way the court could have acquired jurisdiction over the garnishee and the property in his hands, if any, was by service of process in the manner prescribed by our statute. This was not done. The attempted service was defective in substance and was no service and the court had no power to permit an amendment of the defect.

The exception is overruled.

W. Austin Whiting and C. F. Clemons for plaintiff.

Humphreys, Thompson & Watson for garnishee.

CONCURRING OPINION BY FREAR, C.J.

As I understand it, the motion to set aside the service on the garnishee was based only on the want of a copy of the signature of the clerk and not on the want of a copy of the seal, but the latter will have to be considered to some extent in disposing of the former question. Also there was no exception to the refusal to allow an amendment. It does not even appear except perhaps by inference that a motion to amend was made.

The law on this subject is in a very unsatisfactory state. Many nice distinctions are made and decisions can be found on each side of almost every phase of the subject. In general it may be said that the law is more strict in the case of original process (such as that now in question) than in the case of mesne process, and in the case of summons to a garnishee, as here, than in the case of a summons to a defendant, and in a case where the question is raised at the outset, as here, than where it is not raised until after judgment. Some courts have gone so far as to hold that the want of a seal alone in a summons to a defendant may be taken advantage of even after judgment, and upon collateral attack, as in *Choate v. Spencer*, 13 Mont. 127, based on *Ins.*

Co. v. Halleck, 6 Wall. 556. The author of a note on that case, in 40 Am. St. Rep. 431, says that this is a decision that, by sacrificing substance to form, "cannot 'but make the judicious grieve'," and contends that the decision in the 6th of Wall. did not go quite so far, but he seems to concede on the same page that if the objection were taken on motion or plea or even on appeal, the defect could not be cured by amendment.

Undoubtedly the prevailing rule formerly was, and perhaps still is, in the absence of statute, that the omission of either the seal or the signature, rendered the service void. The better opinion at the present time, however, seems to be that if either is present the writ may be amended or at least ought to be amendable as to the other. *Dwight v. Merritt*, Fed. Rep. 614; *Wolf v. Cook*, 40 Fed. Rep. 432. The object of the signature and seal is to show that the summons issued from the court, and the presence of one is sufficient to furnish something to amend and amend by, as it is said. And yet it must be conceded that in most instances where such amendments have been allowed, it has been by express statutory authority. There is no such express authority here. Section 1260 of the Civil Laws, does not relate to amendments of process. It should be amended so as to apply to more than the pleadings. But it is at least doubtful whether if so amended it would permit an amendment when both seal and signature are absent. The cases do not seem to go so far under such statutes elsewhere. It is true the court has power in the absence of statute to amend process, but not to the same extent as under the statutes.

The questions of importance seem to be whether there is sufficient on the copy served on the garnishee to show that the original summons issued from the court and whether the strictness of the law as to originals should be relaxed as to copies sufficiently to permit an amendment as to both seal and signature.

In *Dwight v. Merritt*, supra, and *Peaslee v. Haberstro*, 15 Blatchf. 472 (19 Fed. Cas. No. 10,884) it was held that the original could not be amended when both signature and seal were lacking. The same has been held where, as here, a copy alone was served. If a copy alone is served, the case is the same as if

the original had no seal or signature. For the copy alone is relied on to bring the party into court and he is justified in assuming that the original is like the copy. *Hoitt v. Skinner* 99 Ia. 360. In *Laidley v. Bright*, 17 W. Va. 779, referred to in a note in 20 Enc. of Pl. & Pr. 1119, a joint judgment against several defendants seems to have been reversed because the copy of the writ served on some of the defendants was not signed by the clerk, but in *Cochran v. Davis*, 20 Ga. 581, referred to in the same note, a motion to dismiss based on a similar ground appears to have been denied. It does not appear in either of those cases whether there was a seal, and there may have been other features in those cases material to the question. In *Kelly v. Mason*, 4 Ind. 618, the court held that the seal need not be copied, but apparently the signature had been copied. In *Lee v. Clark*, 53 Minn. 315, in which the signature of the attorneys was not copied, as required by the statute, the names of the attorneys indorsed on the summons and signed to the complaint attached to the summons, were copied, the question was not raised until after judgment, and the court said that the proper course would have been to have moved to set aside the service. In *Martin v. Lindstrom*, 75 N. W. (Minn.) 1038, the original, properly signed, was read to the defendant, in addition to handing him a copy without the signature. In *Collins v. Merriam*, 31 Vt. 622, there was merely a dictum that the omission to copy the signature of a justice of the peace would not defeat the effect of the service as a notice, but so far as appeared, as held by the court, such signature had been copied; and see *Andrus v. Carroll*, 35 Vt. 102, holding the writ void where the magistrate's name did not appear on the original. *Miller v. Ziegler*, 44 W. Va. 484 (67 Am. St. Rep. 777), which is much relied on by the plaintiff, related to the original, not to a copy. In that case it was held that the writ was amendable in respect of the signature. It does not appear that the seal also was wanting, and, to judge from the authorities cited and the language used, the court apparently did not intend to decide that both the seal and the signature could be supplied by amendment.

But it appears that the following indorsement on the summons

was copied on the copy: "Issued at 3:10 o'clock P. M., October 14, 1902. J. A. Thompson, Clerk." Was this sufficient? This indorsement was not required by law. It was a separate act from signing the writ and was for a different purpose. It was not intended to authenticate the writ. It was no more than a statement that the writ, such as it was, that is, unsigned and unsealed, had issued. A clerk's certificate that an invalid writ had issued would not validate it. In *Andrus v. Carroll, supra*, the magistrate omitted to sign the writ, but signed the minute of recognizance on the same paper just below the space left for the signature to the writ. The court held that this was a separate and distinct act and that the defect was fatal, although no opinion was expressed as to whether it was curable by amendment, as there was no exception to a refusal to allow an amendment—which is the case here. In *Lindsay v. Kearney County*, 56 Kans. 630 (44 Pac. 603), the summons was not signed, but there was an indorsement on the back signed by the clerk stating the amount for which judgment would be taken in case of a default. The court held that the summons was void, on the theory that the signing of the indorsement was a separate act and not required by law. In *Baker v. Swift*, 87 Ala. 330 (6 So. 153), however, the signing of an indorsement was held sufficient, but in that case the indorsement was of a writ of seizure, which was required by law, and this was signed officially, and the property was actually seized, and no objection was made, and the court remarked that that case was distinguishable in several particulars from that of *Harrison v. Holley*, 46 Ala. 84, in which summons was held void because unsigned.

Accordingly, I must hold, though with great reluctance, that the service was insufficient and that the exception should be overruled.

DISSENTING OPINION OF PERRY, J.

The object of the service upon the garinshee required by our statute is to give him notice of the institution and nature of the action, and of the court, time and place at which it is returnable.

In my opinion, the service made in this case was sufficient to accomplish this purpose. The original summons was duly signed and sealed and was of full force and effect. The copy was perfect in every respect save only as to the lack of a copy of the signature and the seal. That it gave the garnishee notice of the nature of the action and of the court, time and place at which it was returnable is clear and unquestioned; and, while the space for the clerk's signature was blank and the seal likewise was not copied, the endorsement on the back, made by the clerk who is authorized by the statute to issue such process, disclosed that process had been issued and was, I think, sufficient notice to the garnishee that the original bore the necessary signature, and that the omission to insert the copy of the signature was a mere clerical oversight. The absence of a copy of the seal is not relied upon by the garnishee and is, indeed, clearly immaterial. Even if the original summons itself had not borne the seal, that alone would not have rendered the service void.

I regard the point made for the garnishee as a technicality which ought not to be upheld. The object of the statute was substantially accomplished.

The exception to the order declaring the service void and setting it aside, should be sustained.

W. H. GREENWELL *v.* FRANK GOUVEIA.

APPEAL FROM DISTRICT COURT, NORTH KONA, HAWAII.

SUBMITTED FEBRUARY 23, 1903. DECIDED MARCH 17, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In replevin the plaintiff is not entitled to judgment merely because the evidence for the defendant shows that the title to the property is in the defendant's son and not in the defendant. The plaintiff must recover, if at all, on the strength of his own title and not on the weakness of that of his adversary.

OPINION OF THE COURT BY PERRY, J.

Replevin of a heifer alleged to be of the value of \$25.00. The defendant filed a plea or answer in words as follows: "And now comes Frank Gouveia, the defendant herein, and says he is in possession of the heifer named in the within declaration as of his own property; that said heifer is not the property of the plaintiff herein." At the trial the plaintiff presented all the evidence which he wished to present and rested. For the defense, the defendant and his son gave testimony and a third witness was called and sworn, but neither this last witness nor two others whom the defendant offered to examine were permitted to testify, the Magistrate granting a motion by plaintiff for judgment on the ground that "the special plea of ownership made in defendant's answer was disproved by defendant's own testimony." In this there was error. That the ownership of the animal was in the defendant's son, as testified to by the latter, would not necessarily preclude a judgment for the defendant nor require one for the plaintiff. The defendant, if permitted, may have proceeded to show either that the animal, although the property of his son, was lawfully in his, the defendant's, possession or that the plaintiff was not its owner and not entitled to its possession. The plaintiff could recover, if at all, only on the strength of his own title and not on any weakness in that of the defendant. Nor was there anything in the form of defendant's plea or answer to require judgment for plaintiff at that stage of the trial. The material portion of the answer was the averment that the heifer was not the property of the plaintiff and the defendant was entitled to present, in support of that averment, the evidence of the three witnesses already referred to.

We may add, with reference to another of the points of law raised by the appeal, that the District Court had authority to permit the production of the animal at some convenient place and there to personally examine the ear-mark in order the better to determine the disputed question of ownership.

The appeal is sustained, the judgment set aside, and the case

remanded to the District Court with instructions to proceed with the trial and for such further proceedings as may be proper.

Holmes & Stanley for plaintiff.

Smith & Lewis and *L. J. Warren* for defendant.

JOHN D. PARIS *v.* J. A. MAGOON, Administrator of the
Estate of Antone Fernandez, Deceased.

MOTION FOR REHEARING.

SUBMITTED FEBRUARY 26, 1903.

DECIDED MARCH 17, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A hearing, requested on the ground that the court overlooked a material point duly presented, is denied.

OPINION OF THE COURT BY FREAR, C.J.

This motion for a rehearing is based on the ground that the court overlooked in its opinion, *ante*, p. 613, a point duly argued and submitted. The point is that Fernandez was not obliged to make a further drive at all after the cattle driven the first time had been turned out with Paris' consent, as it is contended. This point, it is urged, is the one vital point in the case. But in defendant's eighteen page brief it was not even mentioned and according to the best of our recollection it was not mentioned at the lengthy oral argument. The point was raised by the exceptions but so were a great many other points that were not argued. The court cannot go through numerous exceptions and decide upon them all when apparently they have been abandoned by counsel. It is true that the statement of facts in the brief and perhaps at the argument included facts upon which the point of law might be based but the court is not bound to raise for itself and decide all points that the facts might suggest when counsel ignore them. The two points chiefly relied on were

those of *res adjudicata* and that the contract died with Fernandez. A third point was briefly touched on, that a further drive could not be required by Paris unless he first tendered the expenses. All these points were considered and decided in the former opinion. The point now relied on was not duly called to the attention of the court.

The motion is denied.

Kinney, Ballou & McClanahan for plaintiff.

J. A. Magoon and J. Lightfoot for defendant.

IN RE TAXES, HENRY MAY & CO., LIMITED.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

SUBMITTED FEBRUARY 24, 1903. DECIDED MARCH 20, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When the taxpayer files a return of its property, for taxation purposes, and the assessor increases the amount thereof, or changes the character of the property so that it is subject to a greater taxation, the right to an appeal is given by Section 875, C. L., although the return may not be technically correct.

On the evidence in the record the valuation of the property given in the return is approved.

OPINION OF THE COURT BY GALBRAITH, J.

This appeal is by the taxpayer from the decision of the Tax Appeal Court of the First Taxation Division. The valuation of the property set out in the return was \$100,860.83. This was increased by the assessor to \$150,000.00 and the increase was sustained by the Tax Appeal Court.

The taxpayer, Henry May & Co., Ltd., is a corporation engaged in the grocery business at Honolulu. Its capital stock is divided into 1500 shares of the par value of \$100 each. The items of its property, as given in the return filed with the as-

essor, are as follows: Leasehold of the premises where its business is conducted, with two years to run, at yearly rental of \$5,000., no value; cash \$2,952.38; stock of groceries \$88,943.38; fixtures and furniture \$8,364.77; horses \$900.00; and making, after deducting the exemption of \$300.00, the aggregate value of \$100,860.83. This aggregate is set out on the printed return, furnished by the tax office, under "Schedule G," "Return of Business Enterprise."

From this incident last named the assessor contends that the taxpayer intended to return its property as an "enterprise for profit" under Section 871, C. L., and that the return does not comply with the provisions of said section and that the penalty for failure to make a return prescribed in Section 872, had been incurred and that the assessor was authorized to make the assessment from the "best information within his reach" and that the assessment so made is binding upon all parties and is not subject to appeal. The Tax Appeal Court concurred in the contention and, finding that assessor "acted in apparent good faith in making the assessment of \$150,000.00," sustained the same.

It appears that the assessor in the use of the information "within his reach" ignored the return made by the taxpayer; that he ascertained from the Territorial Treasurer that this corporation had not made the annual return or exhibit required by the corporation statute and from the return of two other corporations owning stock in this company that its stock was carried on their books at par. From this information the assessment was placed at \$150,000.00, the par value of its entire capital stock.

It is not clear that the taxpayer intended to return its property as an "enterprise for profit," the entry under "Schedule G," may have been made through inadvertence or mistake. If it was so made it would be clearly unjust to hold that there was no return and that the taxpayer had incurred the penalty prescribed for failure to make a return and was denied the right of an appeal from the assessment made by the assessor.

The taxpayer filed a return under oath setting out a valuation of the several items of its property. The amount of the property

was increased from the return and, under the contention of the assessor, the character of the property was also changed from an assessment of individual items of property to one of property "combined and made the basis of an enterprise for profit." In either event the taxpayer was entitled to an appeal as a matter of right. This right is given when a return has been filed and the "amount of the property is increased from the return" "or the character of the property is changed so that it is subject to a greater taxation." Sec. 825, C. L. *McBryde v. Kala*, 6 Haw. 529. *Shaw v. Booth*, ante, pp. 117, 120.

It will not be necessary to define in this case, what constitutes property "combined and made the basis of an enterprise for profit" within the meaning and intent of Section 871, C. L., since the taxpayer had the right to an appeal and we are of the opinion from a review of the evidence that the valuation of the property approved by the Tax Appeal Court is not supported by the testimony given at the hearing and ought to be set aside.

The appeal is sustained and the valuation approved by the Tax Appeal Court is set aside and the valuation of the property as shown by the return is approved.

Hatch & Silliman for taxpayer.

Robertson & Wilder for assessor.

HAWAIIAN TRUST AND INVESTMENT COMPANY, LIMITED, v. ANNIE BARTON, HELEN A. DUNNING, A. V. GEAR AND T. F. LANSING (doing business under the firm name of Gear, Lansing & Co.), J. OSWALD LUTTED, J. J. SULLIVAN AND J. BUCKLEY (the last two named doing business under the firm name of Sullivan & Buckley).

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED FEBRUARY 24, 1903. DECIDED MARCH 31, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The grantee named in a deed which conveys land to him in trust for the benefit of others may bring in his own name an action of ejectment against third parties for recovery of the property described in the deed or an interest therein.

OPINION OF THE COURT BY PERRY, J.

This is an action of ejectment. At the close of the plaintiff's case, the defendant moved for a non-suit on the grounds, (1) "that plaintiff has not proved title in itself" and (2) "that plaintiff could only sue as trustee and the *cestui que trust* must be joined as plaintiff." The motion was granted. The proof was that the deed relied upon by the plaintiff was to "The Hawaiian Trust & Investment Co." with *habendum* to it, its successors and assigns, in trust to pay the net income to one Aldrich and to convey the land as directed in Aldrich's last will or, in failure of such will, to his heirs at law. The only question argued in defendant's brief is whether upon this proof the plaintiff can recover on a declaration wherein it is named simply "The Hawaiian Trust & Investment Co.", without describing itself as trustee for Aldrich, and wherein it claims "by purchase and otherwise a fee simple title."

In our opinion, the plaintiff established a *prima facie* case. The deed passed the legal title to the Hawaiian Trust & Investment Co., the plaintiff. That title was in fee simple. The purposes of the trust required it to be. The action is at law and not in equity. The equitable title is not in issue in this case, no question arising between the trustee and the *cestui que trust*. The case is not, as contended by the defendant, parallel with that of an administrator bringing replevin or a guardian suing in ejectment. The individual in the action of replevin has no title in himself but his right to the property is solely by virtue of his appointment as administrator; the title to the property sought to be recovered by the guardian is in the ward and, in modern practice at least, the action is therefore brought in the name of the ward, the guardian acting in the matter much as an agent would act. In the case before us, on the other hand, the title is

in the corporation itself although subject to certain trusts, which the beneficiary may enforce in appropriate proceedings.

See, on this subject generally, Underhill, Trusts §789; 2 Perry, Trusts, 475; 2 Beach, Trusts and Trustees, 410, 413, 414; Flint, Trustees, 126; Loring, A Trustee's Handbook, 22, 23; *Hawkins v. Berkshire*, 2 Allen 254, 258; *Crane v. Crane*, 4 Gray 323; *Davis v. R. R.*, 11 Cush. 506, 509; *Woodman v. Good*, 6 W. & S. (Pa.) 169, 173, 174; *Smith v. Portland*, 30 Fed. 734, 738; *Walker v. Fawcett*, 29 N. C. 44, 46, 47; *Treat v. Stanton*, 14 Conn. 445, 451; and *Cary v. Whitney*, 48 Me. 516, 524, 530.

The exceptions are sustained, the judgment set aside and a new trial ordered.

Kinney, McClanahan & Bigelow for plaintiff.

Robertson & Wilder, Hatch & Silliman, Holmes & Stanley and *G. A. Davis* for defendants.

KAPIOLANI ESTATE, LIMITED *v.* KANEOHE RANCH
COMPANY and YIM QUON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 7, 1903.

DECIDED APRIL 1, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An exception to the order of a Circuit Judge granting a motion and directing a verdict for the defendant in an ejectment suit, one of the grounds of the motion being that the undisputed evidence showed title to the premises in controversy to have vested in the defendant by adverse possession, is overruled.

OPINION OF THE COURT BY GALBRAITH, J.

This was an action of ejectment commenced in the Circuit Court of the First Circuit, to recover 17.68 acres of rice land located in the District of Kailua, Koolaupoko, Island of Oahu.

The plaintiff claimed by paper title initiated by Royal Patent No. 2906, dated Jan'y 17, 1863, and delivered to the grantee April 15, 1879, while the defendants claimed by paper title under a grant of the ahupuaa of Kailua, May 20, 1854, and by quit claim deed from the government to C. C. Harris executed February 10, 1876, and by adverse possession of the premises for more than the statutory period of twenty years.

At the close of the evidence both parties moved the court for a direction of the verdict. The plaintiff's motion was based on three grounds, (1) that there was no evidence of an entry by the claimant under adverse possession, (2) that the evidence did not establish adverse possession for the statutory period, (3) that under Article 39 of the Constitution of 1864, there could be no adverse possession of the private lands of the King. The defendants set out five grounds in their motion, (1) that no connection had been established between "one-half of Kapia," the land to which the government had title and that described in Royal Patent No. 2906, and that the survey of the land described in this Patent was made *ex parte* and that there was no testimony identifying the land set out in this patent as part of the land of Kapia with known boundaries, (2) that the grant of "one-half of Kapia" was uncertain and incapable of definite location and was void for uncertainty; (3) that the government had parted with all of its title to the land in controversy prior to the time of the issuance of Royal Patent No. 2906; (4) that defendants' paper title to the premises was complete prior to the issuance of the patent to plaintiff's grantor and no part of the premises passed by said patent No. 2906; (5) that undisputed evidence established an absolute title in defendants by adverse possession even if their record title was not conclusive and perfect.

The court below denied the plaintiff's and granted the defendants' motion without specifying the ground on which the same was allowed and directed a verdict for the defendants. The plaintiff excepted to this ruling and this is the only exception urged in this court.

There being little or no dispute as to the facts in the cause

there was nothing to submit to the jury and the entire controversy was resolved into questions of law for the court.

There are many difficult and perplexing questions of law presented by the record and argued with ability and earnestness by counsel that it will not be necessary to go into or determine, since, if the defendants' contention on the one question of adverse possession is sustained, this alone will effectually dispose of the exception and absolutely bar all claim of the plaintiff to the premises in controversy.

This action was commenced on December 28, 1899. In the year 1876, the defendant Yim Quon entered into possession of the premises in controversy under a ten year lease from C. C. Harris, through whom the defendants deraign title, and commenced the draining and preparation of the land for rice cultivation. Yim Quon has been in the open and continuous possession of the land from that time up to the day of trial. He has been in possession as the tenant of the defendants and their predecessors in title and has paid rent to them and to no others.

It is admitted in plaintiff's brief that the possession of Yim Quon has been "physically continuous, open, adverse and hostile as regards the plaintiff" but it is contended that this is not sufficient to vest title, although his possession had continued for more than twenty years prior to filing this suit, for the reason that there was "no privity between Yim Quon's two holdings."

The record disclosed that in August, 1883, prior to the expiration of the ten year lease from C. C. Harris under which Yim Quon entered into possession, he accepted from Harris' daughter and heir, Nannie R. Brewer, a fifteen year lease for the premises at an advanced rental and that this lease excepted from its operation "all kuleanas of natives or others which may be situated within the premises above described." The plaintiff contends that the land in dispute was a kuleana within the "premises described" and was not included in this second lease and that from the date thereof, 1883, Yim Quon held the premises as a trespasser and not as tenant of defendants and their predecessors in title.

It is sufficient answer to this argument to state that it assumes that to be a fact which the evidence does not establish, *i. e.*, that the land in dispute is a kuleana. Counsel treat it as an Ili Kuponono in one part of the brief and in another as a Kuleana. It may be either an Ili Kuponono or a Kuleana but it cannot be both. If it was a kuleana, since no award issued for it, it passed to the defendants' grantor by the award of the Ahupuaa of Kailua in 1854 prior to the initiation of plaintiff's title and no title ever passed to the plaintiff. If it is not a kuleana it is not excepted from the operation of the lease and under plaintiff's admission a perfect title has vested in defendant by adverse possession, unless another contention made by the plaintiff to be hereafter considered is good.

Again there is no evidence of probative force to show an intention of the parties to exclude the premises from the operation of the lease of 1883. Yim Quon was cultivating the land in dispute and agreed to pay an increased rental for it for an extended term and he certainly would not have made such an agreement if the area of the premises was to be reduced almost one-half. He continued to cultivate the land after as before the execution of the second lease and to pay rent to the same parties and testified that his possession of all the premises during all of the time of his occupancy was for the defendants. "The mode adopted for the transfer of possession may give rise to questions between the parties to the transfer; but as respect the rights of third persons, against whom possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed or by mere agreement, either written or oral." *McCully v. Langan*, 22 Ohio St. 32; *Vance v. Wood*, 22 Or. 77.

In the case at bar the possession was continuous, uninterrupted and adverse for more than twenty years. There can be no question of privity. The possession was by the same individual and he recognized, as landlords during the entire period, only persons having privity of title.

It seems that King Kalakaua acquired the plaintiff's title to the premises in the year 1880 and held the same until his demise in the year 1891. It is contended that during a part of this period, *i. e.*, between the date of acquisition and the abrogation of the Constitution of 1864 in the year 1887, Article 39 of that Constitution prevented the statute of limitation from running against the private lands of the King and that if this seven years of the King's holding is deducted from the time of defendants' possession it is less than the statutory period. Counsel recognizes that this court held against this contention in the case of *Kapiolani Estate v. Cleghorn*, *ante* 330, but it is argued that the court was in error in that decision and that we should now review and reverse the holding then made. We are compelled to decline to do this for the reason that that decision was rendered after full argument and deliberate consideration and although there was the same party plaintiff, in that case as in this, represented by the same counsel, there was no motion for rehearing presented in that case. Under these circumstances we are not inclined to re-examine the decision in the *Cleghorn* case, especially since after a careful consideration of counsel's able argument we are inclined to the opinion that if we did go into the question again we would not reach any different conclusion now than we did at that time.

The exception is overruled.

Kinney, Ballou & McClanahan for plaintiff.

Hatch & Silliman for defendants.

OPINION OF PERRY, J.

I concur in the foregoing opinion in so far as it relates to the continuity of the possession held by the defendants and those under whom they claim, but on the subject of Article 39 of the Constitution of 1864 adhere to the views expressed in the dissenting opinion in the case of *Kapiolani Estate v. Cleghorn*, *ante* 330, 338. In view of the conclusion of the majority, it is unnecessary for me to consider the other questions argued by counsel.

LEE CHU and C. K. AI v. ISAAC NOAR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 27, 1903.

DECIDED APRIL 3, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A decree of sale in a partition suit need not contain a particular description of the property involved if by reference a precise description set forth in the bill of complaint is sufficiently and by apt words made a part of such decree. The better practice, however, is to incorporate a precise description in the decree.

The evidence in this case held to disclose no circumstances justifying the appointment of a receiver to take possession of the property and collect the income thereof.

In partition suits the better practice is to set forth, either in a separate decree or in the same decree with the order of sale, an express statement of the findings of the court concerning the right of the parties to a partition and their respective interests or at least, in a case where the truth of the averments of the bill on those subjects is admitted by the answer, a recital of such agreement of the parties. Upon the evidence in this case, the Circuit Judge correctly found (a) that the property is incapable of partition in kind without great prejudice to the parties and (b) that a sale should be ordered.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity wherein it is averred that the complainants and the respondent are the owners, as tenants in common, of a certain piece of land situate on the corner of Fort and Kukui Streets in this city and also of a certain lease of another piece of land situate on Fort Street and adjoining that first described; that the interests of the parties are, respectively, one fourth, five sixteenths, and seven sixteenths; that the parties desire to have a partition of the property but that the same

is incapable of a fair and just partition. The prayer is for a sale of the premises and a division of the proceeds. The respondent in his answer denies that the property is incapable of just partition, admits the truth of all the other averments of the bill and asks that a partition in kind be ordered. The court decreed a sale and appointed a commissioner to make such sale and also a receiver to take possession of the property and collect its rents, issues and profits. The respondent's appeal attacks the decree on four grounds which will be referred to in their order.

1. That the decree is uncertain in that the property involved is not described therein. The property is referred to in the decree as "the lands described in the petition of plaintiffs herein" and the bill contains a definite description by metes and bounds. This is sufficient. The rule that that is certain which can be made certain applies. See 5 Encycl. Pl. & Pr. 1067; 11 Ib. 955; *Haws v. Mining Co.*, 160 U. S. 303, 314; *Hogue v. Fanning*, 73 Cal. 54, 57; *McGee v. Smith*, 16 N. J. Eq. 462, 465; *Foster v. Bowman*, 55 Ia. 237, 240. It may be added, however, that in our opinion the better practice is to insert in the decree a particular description of the property.

2. That the appointment of a receiver was irregular and not justified either by the pleadings or by the proofs. The bill contains no specific prayer for the appointment of a receiver. Assuming that in a suit for partition the court may under the prayer for general relief or, without such prayer, of its own motion appoint a receiver to take charge of the property and collect the income, still in this case we think that the appointment must be set aside as wholly unsupported by the evidence. A careful examination of the transcript of the evidence fails to disclose any facts or circumstances rendering the appointment necessary or justifiable. So far as appears, there was no exclusion of the complainants by the respondent from the enjoyment of the property, nor any degree of hostility between the co-tenants or other conditions such as to warrant the belief that injury would result to the interests of any of the parties unless a receiver was appointed. The evidence was that the respondent collected the rents and otherwise acted as agent for

the property untill about seven or eight months prior to the hearing in the court below and that after that the complainants took charge. No complaint was made by any of the parties as to the management of any of the others, nor was any application made for the appointment.

As to the appealability of this provision of the decree, it is sufficient to say that in this jurisdiction it is well settled that an appeal from the final decree in an equity case brings up for review interlocutory orders made during the progress of the case. Even matters within the discretion of the trial judge may be reviewed and the orders made set aside if the making of them constituted an abuse of discretion, and in this case our conclusion is that there was such an abuse.

3. That no interlocutory decree was rendered, determining the interests of the parties or that the complainants were entitled to partition. That an adjudication was made by the court on these two points appears from the decree by inference only. Besides providing for the appointment of the receiver the decree merely sets out the finding of the court that a partition in kind cannot be made without injury to the parties and that a sale would be more advantageous, orders a sale of all the right, title and interest of the parties, and provides for the appointment of a commissioner to make the sale and to report to the court within ten days thereafter. That the complainants are entitled to partition and what the respective interests of the parties are, are matters which should be adjudged by the court before ordering a sale. See Freeman on Cotenancy & Partition, §516; 15 Encycl. Pl. & Pr. 809, 810, 820; *Green v. Fisk*, 103 U. S. 518, 519; *Lorentz v. Jacobs*, 53 Cal. 24, 26; *Stevens v. McCormick*, 90 Va. 725 (19 S. E. 742). Whether or not the present decree with the inferences deducible from it would be good on collateral attack, the usual and better practice is to set forth, either in a separate decree or in the same decree with the order of sale, an express statement of the findings on these subjects or at least, in a case such as this, a recital of the agreement of the parties concerning the facts.

4. That the evidence was insufficient to warrant an order of sale. Without setting forth in detail the pertinent facts, our conclusion is that upon the evidence adduced the Circuit Judge correctly found, in effect, that the two pieces of land owing to their situation with reference to each other, their size, shape and other physical features, and the nature and position of the buildings on them, are incapable of being divided in kind without great prejudice to the parties. It is not without significance in this connection that respondent, while contending that a sale is not justified by the circumstances, has failed to suggest any method by which the desired partition in kind can be accomplished. No request was made at the trial for reference to a commissioner to report whether in his opinion such partition could be made. Nor do we see upon the case as disclosed by the evidence, how the awarding of owelty can be resorted to with any assurance that justice will be thereby done to the parties.

The decree appealed from is set aside and the cause remanded for such further proceedings, not inconsistent with the foregoing views, as may be proper.

J. A. Magoon and J. Lightfoot for complainants.

Humphreys, Thompson & Watson for respondent.

KAPIOLANI ESTATE, LTD., v. MARY H. ATCHERLY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 9, 1902.

DECIDED APRIL 7, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If a decree is not clear or is ambiguous in its terms, it may be construed in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record.

A decree that A., "as guardian of K., D. and M.," minors, do convey to D. K. certain lands named, held, in the light of the pleadings and the remainder of the record, to be an order for the conveyance of the intrests of the minors.

In a suit in equity brought to enforce a former decree of a court of equity, the respondent by demurrer questioned the validity and the correctness of the original decree. Held, that the attack thus made is collateral and not direct.

Upon collateral attack, mere errors or irregularities cannot be taken advantage of.

A decree rendered in 1858, requiring a guardian to execute a conveyance of land of his wards, minors, upheld, although it appeared that in the original suit the guardian as such, and not the minors, was named as the party defendant and that service of summons was made on the guardian as such and not on the minors themselves.

While upon a bill to carry a decree into execution the court may re-examine the propriety of the original decree, still it is not bound to do so in all cases. Where no fraud is alleged in obtaining the original decree,—declaring a trust and ordering a conveyance to the *cestui que trust*—and that decree is not incomplete, was adversary and not by consent, was rendered more than forty years prior to the request for re-examination and was followed during the whole of that period by sole and undisputed possession of the land by the complainant and his successors in interest, the decree should not be opened up.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., Dissenting.)

This is a bill to enforce a decree in equity rendered by the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands, in Chambers, on November 2, 1858, by which decree it was ordered "that Mr. Armstrong, as Guardian of Kinau, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo on the Island of Molokai, and the first apana of land set forth in Royal Patent No. 1602 filed in this cause." The prayer is that the respondent be permanently enjoined from prosecuting an action at law instituted by her to recover possession of Apana 1 of R. P. 1602, L. C. A. 129, and from bringing any other proceedings for the same purpose, and that she be decreed to be the trustee of all the right, title and interest of Kaniu, David

Leleo and Moses Kapaakea Kinimaka in and to the land described for the benefit of the complainant and as such trustee be ordered to convey all such interests to the complainant. A demurrer to the bill, on the ground that no cause of action was stated, was sustained *pro forma* and the bill dismissed. From that order the complainant appeals.

The main question is whether the respondent is bound by the decree of 1858. The essential facts, stated in detail in the bill, are as follows:

On December 29, 1856, David Kalakaua filed a bill in equity, in the court on this island then having jurisdiction in such matters, against one Kinimaka. In that bill he alleged, in substance, that he was born in 1836, that prior to 1844 he lived with one Kaniu, a chiefess, as her adopted child according to the custom of the country; that Kaniu was seized of certain rights, hereditary and other, in certain named lands, about thirteen in number, situate within the kingdom and including that of Onoulimaloo, Molokai, and the apanas, house-lots in Honolulu, described in L. C. A. 129; that Kaniu died in 1844, leaving her husband, Kinimaka, the respondent, but no issue; that on the day of her death Kaniu made an oral will, good according to the custom of the country, whereby she appointed the complainant her heir and left to him all her property; that during the session of the Board of Land Commissioners to Quiet Land Titles, Kinimaka procured to be awarded to himself four of the lands named, including the house lots in Honolulu. Certain other facts were also set forth by virtue of which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

Upon the filing of that bill a summons in the ordinary form was issued and served upon Kinimaka. The latter, however, died on January 24, 1857, without having answered the bill. On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving "as heirs by will" his three minor children, Kaniu, D. Leleo and Moses Kapaakea, and prayed that the heirs be made

parties to the bill, that a guardian *ad litem* be appointed for them and that a time be set for the further hearing of the cause.

March 6, 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian *ad litem* was appointed to represent the three minors in that proceeding and citation was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian *ad litem* of the minors. Further proceedings having been had, the probate court, on May 3, 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua.

Upon petition of Pai, filed April 24, 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

On July 19, 1858, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December, 1856, adding, however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house-lots awarded by L. C. A. 129, R. P. 1602, and the ahupuaa of Onoulimaloo, L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding portion of the bill of 1858 read: "And your orator would further represent, that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka, for which said children R. B. Armstrong, D.D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court why it should not

be decreed that the lands, hereinbefore mentioned, of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and hold possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator, all her right, title and interest in and to the above-enumerated lands. And that such other orders and decrees may be made and passed in the premises, as may pertain to equity and good conscience, and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai (w) and Richard Armstrong (Guardian of Kaniu, Leleo and Kinimaka, minors), defendants", to appear, etc. Service of this summons was made upon Pai and upon Richard Armstrong.

To the bill of 1858 an answer was filed entitled "The Joint and Several Answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kinimaka, minors, Defendants, to the Bill of Complaint of David Kalakaua", and signed "Pai, Richard Armstrong, Guardian of Kaniu, David Leleo, Kinimaka, minors. By Asher B. Bates, their Solicitor". But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments and the complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the Board of Commissioners to quiet land titles which satisfied that Board that Kinimaka was entitled to such awards.

At the trial, counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu and that she attempted to pass it by will to Kalakaua, nevertheless the King, cognizant of these facts, took back at the time of the great division his title to the land and thereafter, through

the Board of Land Commissioners, made a re-distribution and gave an award covering these lands to Kinimaka and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the court. Thereafter, on November 2, 1858, the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1 of R. P. 1602, and on the same day the final decree now sought to be enforced was made.

Kinimaka by will left his property to Kaniu for life, after him to David Leleo for life and after him the remainder in fee to Moses Kapaakea who was sometimes called Kinimaka in the proceedings under review. David Leleo died before Kaniu and Moses Kapaakea survived the two others. The defendant now holds by purchase from Moses Kapaakea, whatever title the elder Kinimaka had to the land. The complainant is likewise the successor to all of the rights of D. Kalakaua in the property. Richard Armstrong is now dead.

A question of lesser importance in the case may be disposed of first, and that is, concerning the construction of the decree. It is contended that the decree does not require a conveyance of the interest of the minors in the land or the giving of a deed in their name by the guardian. If the decree is not clear or is ambiguous in its terms, it may be read in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record. See *Clay v. Hildebrand*, 34 Kan. 694 (9 Pac. 466); *Finnagan v. Manchester*, 12 Ia. 521, 2; 5 Encycl. Pl. & Pr. 1064; Freeman on Judgments, §45; 1 Black on Judgments, §123. So read, there can be no doubt, it seems to us, that it was the intention of the court to order the conveyance of the interests of the minors. In our opinion that intention is sufficiently expressed in the decree.

The main contention in support of the demurrer is that the minors were not bound by the decree of 1858, because they were not themselves named as parties defendant in the suit.

In *Meck v. Aswan*, 7 Haw. 750, it was held that an action to

recover rent due for use of a minor's land should be brought in the name of the minor by her guardian and not in the name of the guardian as such. The court said, *inter alia*: "In the case at bar, a guardian for the minor had been appointed by the Probate Court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one, or by some one specially appointed by the court. The suit is nevertheless that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact. The principal brings the action by the attorney in fact." It may be that this is the better rule, that it should apply as well to actions *against* minors, that the weight of modern authority elsewhere is in support of this view and that such is the practice at the present day in this Territory. But, however that may be, we think that if, as contended for by the complainant, the contrary practice prevailed in our courts prior to the decision in the *Aswan* case, and the proceedings in *Kalakaua v. Armstrong, Guardian, and Pai* were in accordance with that practice, the decree sought to be enforced should be held good and binding as against the minors.

In *Meek v. Aswan*, the court recognized the prior existence of a different practice. It said: "We are aware that a different practice has in many instances been followed in this court without objection, and suits have been instituted in the form of A. B., guardian of C. D." At the time of that decision (1889), the five members of the Supreme Court sat singly at *nisi prius*, exercising the jurisdiction and powers now vested in our Circuit Judges, and were therefore in a position to know what the practice in such matters was; and in this connection the ruling of Mr. Justice McCully, of the Supreme Court, who presided at the trial before the jury, is of great significance. The case had been instituted in the District Court of Honolulu where judgment had been rendered for the plaintiff. On appeal, after the jury had been empanelled and sworn and the plaintiff had

opened the case, the defendant's counsel moved to dismiss on the ground that the action had been improperly brought in the name of the minor by her guardian and should have been brought by "G. S. Houghtailing, guardian of Eliza Meek." So thoroughly imbued with the past practice was the presiding justice, who afterwards joined in the decision sustaining the exceptions, that he held the declaration defective in respect to the party plaintiff and granted the motion to dismiss. It is interesting to note, in passing, that in the *Aswan* case the court said that the objection to the complaint, even if tenable, should not have been visited with a dismissal, but that an amendment should have been allowed,—in other words, that the error, if any, was at most a mere irregularity and not one affecting the validity of the proceeding.

Formerly, by the common law of Hawaii, guardians possessed and exercised the absolute right to dispose of the real and personal estate of their wards, as might suit their own will. See preamble to Act of August 4, 1851, (Laws of 1851, p. 63); *Laanui v. Puohu et al.*, 2 Haw. 161, 162; *Thornton v. Bishop*, 7 Haw. 431, 434, 435; *Hoare v. Allen*, 13 Haw. 257, 261. It is not to be wondered at that the view as to the title of a guardian in the land of his ward and as to his powers generally growing out of those conditions, had not changed to any great extent during the few years next succeeding the enactment of the law of 1851 which abridged the rights and powers of guardians.

An examination of the records in some old cases referred to at the argument bears out the statement made in the *Aswan* decision as to the earlier practice.

In Law Case No. 627, 1856 and 1857, an action of ejectment, Kalama, the plaintiff, alleged in her declaration that Kekuanaka and Ii "have wrongfully entered upon" certain land described "— as you petitioner understands claiming to hold the same on behalf of H. R. H. Victoria Kamamalu—but whether this last averment be true or not complainant does not of herself know." There was no other allegation in the least tending to establish a case against Victoria Kamamalu or from which the inference might be drawn that the two men were being sued as guardians

of Victoria. The two answered, and Victoria filed a motion, which was granted, "that the cause may be discharged as against her, as the petitioner alleges no cause of action against her to which she can plead." Concerning this motion the clerk in his minutes says that "Mr. Bates moved that Victoria's name be stricken out as it was not pretended that she had any control over it, but merely her guardians for her benefit." This is the first reference to the two defendants as guardians but from the remainder of the record it is apparent that it was regarded both by court and counsel that the defendants were being sued as guardians and in the title of the court's decision and of the appeal they are named as guardians. By stipulation of the parties, the court tried and determined the question of right and title to the land, that of damages to be submitted later, if necessary, to a jury or to referees, it being, however, the ward's right and title, and not that of the two men who were guardians, that was involved.

Ikalua (k), guardian of Kanakaokai Aikaula (k) v. Kopaea and others, 1879, (Law No. 1463), Neil Campbell, Guardian of the persons and property of Kaua (k), Ana (w) and Kamaka (k), minors, and Emilia (w) and Neil Campbell, her husband, v. Manu, *et al.*, 1881, (Law No. 1277), Naweli, Guardian of four minors named, v. Mary A. Auld and husband, 1881, (Law No. 1805), and A. F. Judd and S. B. Dole, Guardians of Airene H. Ii, a minor v. Kuanalewa, *et al.*, 1881-1882, (Law No. 2032), were all actions of ejectment in which the title of the wards was tried and determined. In each case the guardian as such was named as the plaintiff, and not the ward by the guardian. So, too, in Equity case No. 568, tried in 1886 and 1887, the bill and all subsequent papers, including two decisions by Mr. Justice Preston, were entitled "Yim Quon v. A. J. Cartwright, Guardian of George Holt and Annie Holt, defendant."

These cases, while but few in number, are sufficient to show a practice different from that declared in the *Aswan* case to be the correct one, and counsel for the respondent, diligent and thorough as he has been in this case, has referred to but one to the contrary. That is the case of Metcalf v. Metcalf, Equity

No. 251, (1859), in which the bill, without title, prayed that Emma Metcalf, a minor, be ordered to convey to the complainant certain premises alleged to be held by her in trust for him. The clerk's minutes and the bill of costs are each entitled "Theophilus Metcalf v. Emma Metcalf" and the decree of the court, as noted by the clerk, was that "the said Emma Metcalf, minor defendant, do release and convey * * * through her guardian *ad litem* J. W. Austin, Esq." On the other hand it may be noted that the complainant also prayed that "a guardian *ad litem* may be appointed by this Honorable Court who may be cited to appear and answer for the said Emma Metcalf and show cause if any there be why the prayer of this petition shall not be granted," that the order to the Marshal was to summon "J. W. Austin, Guardian *ad litem* for Emma Metcalf, defendant," that service was made as directed on the guardian, and that the respondent's answer was entitled "Theophilus Metcalf v. J. W. Austin, Guardian *ad litem* of Emma Metcalf" and signed by "J. W. Austin, Guardian *ad litem* of Emma Metcalf."

It is true in none of the cases cited by the present complainant does it appear that the question was specifically raised. Yet from the very silence of court and counsel can be implied acquiescence in that mode of procedure and approval of it. "Where a court has erroneously held that certain things were sufficient to give jurisdiction and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions."—Van Fleet, Coll. Attack, p. 4. Decrees rendered during the period in question extending from forty-five or more years ago to fifteen years ago, settling the titles to real estate and made in conformity with a procedure then regarded as good and impliedly decided to give jurisdiction to the court and to bind the wards, should be now upheld, irrespective of any later change in procedure and even though the lawyers and judges of to-day think differently as to the correctness of the former practice.

If the defects complained of can be regarded, not as matters affecting the jurisdiction but as constituting at most mere error, certainly such error cannot be taken advantage of in this case because the attack now made on the decree of 1858 is collateral

and not direct. "A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree."—17 Am. & Eng. Ency. Law, 2nd ed., 848. See also *Morrill v. Morrill*, 20 Or. 96, 101; *Nichols v. Smith*, 26 N. H. 298, 300. "The word 'collateral' ", in this connection, "is always used as the antithesis of 'direct', and it is therefore wide enough to embrace any independent proceeding. To constitute a *direct* attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule."—1 Black on Judgments, Sec. 252. "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. * * * A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law."—Van Fleet, Collateral Attack, pp. 4, 5. Under either of these definitions,—we have not found any essentially different—the present attack is collateral. The complainant's bill has for its sole object the enforcement of the decree and necessarily proceeds on the assumption that that decree is not made in any manner provided by law nor in a proceeding instituted expressly for that purpose. "An attack on a judgment in a proceeding to revive it is a collateral attack."—*Sharon v. Terry*, 36 Fed. 337, 346. See also 1 Black on Judgments, Sec. 252.

Service of summons in the case of *Kalakaua v. Armstrong* was made on the guardian and not on the minors themselves. The same procedure was followed in *Metcalf v. Metcalf* and in *Yim Quon v. Cartwright*, and is not unsupported by precedents

elsewhere or in reason. The minors in this case were, in 1858, about eleven, seven and one year old respectively. Service on them would be, in reality, a worthless form. After service it is the guardian who acts and who conducts the whole defense; the ward does nothing and can do nothing. True, in theory, such service would serve to notify their parents or others standing in *loco parentis* of the institution of the suit. That purpose was in fact accomplished in this case for their mother, Pae, was herself a defendant and the guardian appointed at her request was also served. General guardians are by our statute, Section 1970, C. L., authorized and required to "appear for and represent" the ward "in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend." A guardian might, perhaps, under this provision, waive service upon a minor defendant and enter an appearance and thereby bind the minor. That there is a difference of authorities as to whether a judgment against a minor without service on him is absolutely void for want of jurisdiction or is merely voidable and so immune from collateral attack, is conceded by respondent. The point as to lack of service is relied upon by her only to the extent of showing that for that reason the decree was erroneous and should not be now enforced.

The old decree is claimed by respondent to be erroneous for the further reason that upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua. The contention of the respondent is that because of these two alleged errors last mentioned, to wit, the lack of service and upon the merits, the court should refuse to enforce the decree. It is not contended that the court *must* in all such cases re-examine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to re-try the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default but were fully defended by counsel. The decree,

while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of forty-four years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested.

As to whether the bill of 1858 was a continuation, by revival of the proceedings instituted in 1856, or was the commencement of a new and independent suit, we express no opinion.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further proceedings as may be proper.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for the complainant.

L. A. Dickey for the respondent.

CONCURRING OPINION OF FREAR, C.J.

I concur in general in the reasoning and conclusions of the foregoing opinion.

It is true, as held in *Laurence Mfg Co. v. Janesville Mills*, 138 U. S. 552, that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill," but that does not mean that the former decree should be opened up in all cases. As a rule it is not opened up where, as here, so long a time has elapsed since it was made and where no fraud is alleged in obtaining it and where it is not incomplete and where it was adversary and not by consent. The case just cited from the Federal Supreme Court was brought to piece out a decree that was both incomplete and by consent. As the court said: "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as *res adjudicata*." And in *Buchanan v. Knoxville & O. R. Co.*, 71 Fed. Rep. 324,

the United States Circuit Court of Appeals for the Sixth Circuit distinguished that case, and, after pointing out that it was a case to piece out an incomplete consent decree and quoting from it the language above quoted herein, said: "That is a very different case from that of a party who stands on a complete decree, and seeks no other benefit or advantage than that which is due by the general law from a former judgment." In the present case it would be practically impossible, owing to lapse of time and the deaths of witnesses, to go into the merits of the former decree, and the plaintiff and its predecessors have been in possession and enjoyed the benefits of that decree without question for more than forty years.

The question whether the guardian or the minors should have been made parties and served in the former case can hardly be said to be involved. We may assume not only, as was perhaps held by implication in *Meek v. Aswan*, 7 Haw. 750, that it would have been correct practice to have made the minors defendants and to have served them, but also that it was incorrect practice to make the guardian the party defendant and serve him alone. Still, if that is only a question of error, and not of jurisdiction, it cannot be raised on a collateral attack. There can be no doubt that this attack is collateral. The only question, therefore, is whether the court in the former case merely committed error or was entirely without jurisdiction, whether the decree was absolutely void or merely voidable on direct attack. The *Meek* case was one of direct attack and the court seemed to intimate that the irregularity complained of, if well founded, was one of error rather than of jurisdiction. In *McAneer v. Epperson*, 54 Tex. 220, in which a judgment was attacked collaterally on the ground that it was void because no service had been made on the minor defendants, the court said: "After a careful and extended examination of many cases in addition to those cited by counsel, in which the judgments in adversary proceedings, like the one now under consideration, were sought to be set aside because the minor defendants, although represented by guardians *ad litem*, had not been personally cited, we indorse this remark of Judge Hitchcock's in *Robb v. Irwin*:

'Much is said in the books upon the subject. But I apprehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void.' 15 Ohio, 699; *Preston v. Dunn*, 25 Ala., 507; *Nelson v. Moon*, 3 McLean's C. C., 319; *Day v. Kerr*, 7 Mo., 426; *Sheldon v. Newton*, 3 Ohio St., 504. * * * *

We are of opinion, upon the weight of authority, that a failure to cite the minor defendants personally in suit No. 2103, they having been defended by a guardian *ad litem*, however sufficiently erroneous to have caused a reversal of the judgment against them on direct proceedings, was not such fatal defect as would render the judgment absolutely void, so that it can be successfully impeached on a collateral attack." In *Dampier v. McCall*, 78 Ga. 687 (3 S. E. 563), the court went so far as to decline to interfere even on direct attack where service had been made on the guardian alone. See also as bearing on this general question, *Smith v. McDonald*, 42 Cal. 484; *Lessee v. Lowe*, 18 Oh. 368; *McFarland v. Fiebiger's Heirs*, 7 Oh. 198; *White v. Albertson*, 14 N. C. 241; *Gotendorf v. Goldschmidt*, 83 N. Y. 112; *Doe v. Litherberry*, 4 McClean 442; *Ankeny v. Blackiston*, 7 Or. 407; *Jongsma v. Pfiel*, 9 Ves. 357; 1 Dan. Ch. Pl. & Pr. 444, note 6. It is true these cases relate to the question of service of process rather than to that of parties of record, but the former would seem to be the more important of the two questions. If the principle contended for is correct, it would seem quite as important that the minors should be personally served as that the defendant should be "A, minor, by B, guardian" instead of "B, guardian, for A, minor." No instance has been cited in which a decree made under either of these circumstances has been held void on collateral attack. The question is not whether *Meek v. Asutan* shall be followed or whether the matter is *stare decisis* in view of the former practice. To hold that the question is one of error rather than of jurisdiction, and so that the decree is not subject to collateral attack, is in entire harmony with the decision in *Meek v. Asutan*; and former practice, as regarded in a number of the cases above cited, greatly emphasizes the pro-

priety of upholding former decrees as far as possible under circumstances like the present.

DISSENTING OPINION OF GALBRAITH, J.

I do not concur in the argument or conclusion announced in the foregoing opinion.

The rule recognized by the Supreme Court of the United States, and absolutely binding on the Courts of this Territory, is that, "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." *Lawrence Mfg Company v. Janesville Cotton Mill*, 138 U. S. 552, 561.

This rule clearly gave the trial court the power in hearing the bill to open up and re-examine the decree of 1858, and, it seems to me, that with the possession of the power there was an implied duty to exercise it. Aside from this consideration a decree that has been permitted to remain dormant for 44 years needs a "clear bill of health" to enable the doctrine of *stare decisis* to be invoked in its behalf and to authorize a court after so long a time to decree its specific performance.

This decree of 1858 did not divest the respondent's grantor of the legal title to the property in dispute, nor did it pretend to do so. It merely ordered Armstrong, as guardian, to convey the property. This he did not do. Why we do not know. The fact that complainant and its grantor remained passive so far as this decree was concerned for all these years while the legal title to property was in another and took no step to force a conveyance of title under the decree is difficult to reconcile with the claim that they felt secure in the legality of the decree. I do not deem it necessary to go into the merits of this decree further than to state that there is sufficient on the face of the bill to raise a serious question in my mind as to its correctness.

I do not consider the claim well taken that the respondent and her predecessor in title "acquiesced" in this decree by the fact that no action was taken to have the same reversed or set aside.

They were not compelled to take the initiative or to do anything, so long as no attempt to execute the decree was made. The decree was harmless to them so long as no attempt was made to enforce it. The burden of action was on the complainant. The legal title was in the respondents' grantor and so long as nothing was done to compel him or them to convey, his, or their, inaction cannot be said to be "acquiescence" to her prejudice.

The doctrine of *stare decisis* has been invoked in behalf of this decree. It seems to me that this doctrine will prohibit the granting of the prayer of the bill. Blackstone says relative to this doctrine "For it is an established rule to abide by former precedents. Where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 Blackstone 69.

I understand that it is the "former precedents" of this Court not the uncertain precedents of the Circuit Court (which can only be ascertained by a tedious search of the files of that Court) that this Court should "abide by" and that it is in this way that we may "keep the scale of justice even and steady and not liable to waver with every new judge's opinion."

This Court has decided in a suit by a minor to collect rent due, that the action should be commenced in the name of the minor by its guardian. (*Meek v. Aswan*, 7 Haw. 750). The converse of this proposition is that a suit against a minor should be against him by his guardian and not against his guardian alone. This is admitted so far as this case is concerned. "It may be that this is the better rule, that it should apply as well to actions *against* minors, that the weight of modern authorities, elsewhere is in support of this view and that such is the practice at the present

day in this Territory." Notwithstanding this admission the decision in the *Aswan* case is not followed, nor is it overruled, in express terms, for the reason that a "contrary practice prevailed in our Courts prior to the decision in the *Aswan* case." This "contrary practice" may have been permissible prior to the decision in the *Aswan* case but that decision having declared the practice wrong we cannot now approve of such practice without overruling that case. That case ought not to be overruled for the reason that it is good law and is supported by the great current of judicial authority elsewhere.

Again, what is the evidence of this contrary practice? No decisions were cited in this jurisdiction to support it. We are referred to the files of some seven or eight cases in the Circuit Court where the papers are entitled as were those in the case in which the decree in question was rendered. It is not contended that the correctness of the procedure was raised in any of these cases or that the ruling of a Circuit Judge supported it, but it is contended that there was an "implied acquiescence" in the practice "from the very silence of Court and counsel." So we have only the "implied acquiescence" of the Court and counsel in seven or eight cases in the Circuit Court extending over a period of thirty or forty years to support the majority of the Court in refusing to follow the decision of this Court rendered at a time when the Court was composed of five judges. This reasoning followed to its logical conclusion, it seems, would prevent this Court from overruling a practice or procedure of the Circuit Court no matter how erroneous provided "court and counsel" had by silence acquiesced in it in a few cases, extending over a number of years.

Again the practice of digging up the files of the Circuit Court and referring to them to establish a practice or procedure does not appeal to me very strongly. There is enough difficulty in determining such questions when reference is made to reported cases where the evidence of the question passed upon is supposed to be preserved in practicable form. To search through a lot of files of the trial court and examine the entitling of the papers and the endorsement on the summons is not in any way a satisfac-

tory method to establish a question of procedure let alone to justify an appellate court in passing by one of its own solemn decisions.

The heirs of Kinimaka were the real parties in interest in the suit resulting in the decree of 1858 and sought to be enforced by the bill. These heirs were not made parties to that suit, were not served with process therein and made no appearance, although their guardian was a party, was served and appeared and contested the cause still the heirs were not parties and were not bound by the decree nor is the respondent in this case and the decree ought not to be enforced without a re-trial of the cause.

The decree sustaining the demurrer to the bill should be affirmed, and the appeal dismissed.

HENRY SMITH v. HAMAKUA MILL COMPANY, LTD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 6, 1903.

DECIDED APRIL 7, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A mere *scintilla* of evidence is insufficient to support a verdict.
The verdict in this case held to be unsupported by evidence.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., Dissenting.)

This is an action of ejectment brought to recover an undivided one-fourth interest in the ahupuaa of Koholalele, Hamakua, Hawaii, containing an area of about 6330 acres. At the first trial a verdict was directed for the plaintiff, but this was set aside by this Court on the ground that evidence had been adduced sufficient to support a verdict for the defendant. The

second trial resulted in a verdict for the plaintiff and the case now comes to this Court on a number of exceptions, only two of which, however, are relied upon. Of these, one is to the verdict as being contrary to the law and the evidence and the other to the overruling of a motion for a new trial. The only question is whether or not there was sufficient evidence to support a verdict for the plaintiff.

First, as to the paper title. Undisputed evidence shows that the ahupuaa in controversy was granted by L. C. A. 26B., R. P. 4527, to Kailakanoa (w) and upon the latter's death passed to her half brother Huakini, who was the son of Kailakanoa's mother, Kapehe the first, but by a second and different husband, Kuauamoa; also that from Huakini the land descended, one half to his widow, Hoomana, and the other half to the heirs, by right of representation, of the two sisters of his mother, that is to say, one fourth to Hanakaulani Holt, the grand-daughter of Paele, sister of Kapehe the first, one eighth to Kapehe the second, daughter of Keaka, sister of Kapehe the first, and one eighth to the descendants of Kapau, brother of Kapehe the second. The plaintiff's evidence, undisputed, as it is reported in the transcript now before us, further shows that Kapau had two children, Kapehe the third and Kailakanoa the second, that these two children survived Huakini, that Kapehe the third left surviving her as her sole heirs two children, Kealakoiula (w) and Peleki (w), that Peleki left surviving her, as her sole heirs, her husband Aalaioa and her sister Kealakoiula, and that Kealakoiula and Aalaioa conveyed by deed to plaintiff all of their right, title and interest to the land in question. It is claimed for the plaintiff that the testimony is incorrectly reported in the transcript in so far as it makes it appear that the "children" of Kapau survived Huakini and that the testimony in fact was that of the descendants of Kapau, only his "grand-children" had survived Huakini. Upon the transcript as it stands, the evidence is not capable of being so read. Further, no evidence whatever was adduced tending to show the time of the death of Kailakanoa the second with reference to that of Kapehe the third or any other facts from which the jury could have found that all or

any part of the interest of Kailakanoa the second passed at her death to Kapehe the third or to the latter's children and thus through her or them to the plaintiff. In other words, the burden of proof being upon the plaintiff and the latter being obliged to rely for a recovery upon the strength of his own title and not upon any weakness in that of the defendant, the evidence on the subject of pedigree was at best insufficient to support a verdict for plaintiff for any more than an undivided one-eighth interest, that is to say, for one half of Kapehe the second's one eighth as it passed through the descendants of Kapau, and for one half of the one eighth which came to the children of Kapau directly from Huakini at his death.

This point was not raised by counsel either at the trial or in this Court and evidently escaped the notice of the trial judge also for the latter gave the jury a direct instruction to the effect that the estate of Huakini at his death passed, one half to Hoomana, one fourth to Kapehe the second and the grand-children of Kapau and the remaining fourth to Hanakaulani Holt, that Kapau left as his sole heirs at law his grand-children, and that the paper title to an undivided one fourth passed to the plaintiff by the deeds of the grand-children. No exception was noted to this instruction. Plaintiff's counsel, on having his attention called to the defect in the evidence, contends that the point must now be regarded as waived by the defendant by reason of the failure to except to the instruction. Perhaps this is so, although on the other hand it may be urged that the exception to the verdict is broad enough to cover the objection and that justice requires that the court should not sustain the verdict with full knowledge that the evidence of pedigree does not uphold it as rendered. However that may be, upon another ground the verdict must, we think, be set aside and a new trial ordered.

The defense was adverse possession. The following facts were proven by undisputed evidence: P. Nahaolelua, a half brother of Huakini by the same father, Kuauamoa, but by a different mother Kaauhuhu, was appointed administrator of the estate of Kailakanoa November 26, 1862. On December 6, 1870, he filed a petition for the approval of his accounts as such admin-

istrator and for a decree declaring who the heirs of the decedent were. At the hearing had on this petition, Kapehe the second was present and testified. Hanakaulani Holt, too, was present and represented by counsel. In those proceedings P. Nahaolelua claimed that the estate of Kailakanoa descended through Huakini, one half to the widow Hoomana and the other half to himself, the half brother. Mrs. Holt claimed one fourth through her grandmother Paele, and it was contended in her behalf that P. Nahaolelua did not inherit because he was an illegitimate son, in other words because at the time when he was born his father Kuauamoa had a first wife living. Chief Justice Allen, who heard the case, filed an opinion and decree on January 21, 1871, wherein he held that in view of the Hawaiian customs prevailing at that period P. Nahaolelua should be regarded as a legitimate half brother of Huakini and decreed that Hoomana and P. Nahaolelua were the rightful heirs and each entitled to an undivided one-half of the estate of the decedent. From that decree Mrs. Holt appealed to a jury, but the verdict rendered, was on September 18, 1871, set aside by the Supreme Court on the ground that the appeal had been taken too late, thus leaving Chief Justice Allen's decree in full force and unreversed.

On April 16, 1872, P. Nahaolelua executed a lease to Charles Notley of the whole ahupuaa for a term of five years from that date. This lease was recorded July 13, 1872. The lessee took possession and made use of the ahupuaa as a cattle ranch and also cut bark from the trees in the forests for tanning purposes. September 21, 1874, Hoomana by deed conveyed to P. Nahaolelua all of her interest in the land, the consideration being \$350. By his last will dated June 11, 1875, and admitted to probate before the Circuit Judge of Maui, November 3, 1875, P. Nahaolelua devised the whole ahupuaa to his son Kia Nahaolelua. The latter by instrument dated January 13, 1877, and recorded January 15, 1877, leased the property, described by metes and bounds, to Walter Murray Gibson for a term of twenty years commencing April 17, 1877, the day after the expiration of the lease first above mentioned, and Gibson in turn

assigned the lease to Charles Notley by writing dated August 29, 1877, and recorded September 5, 1877. On December 2, 1878, Kia Nahaolelua executed a deed of the ahupuaa to H. A. Widemann for a consideration of \$1,125, with a covenant of warranty, subject only to a mortgage of \$5,000. This deed was recorded December 26, 1878. Widemann conveyed the land to Charles Notley, March 27, 1882, for a consideration of \$9,500. May 4, 1886, Charles Notley and T. H. Davies formed a partnership for the purpose of carrying on a sugar plantation in Hamakua and as a part of that transaction Notley contributed and conveyed to the partnership the ahupuaa; and on April 1, 1886, the land was, with other property, conveyed by Notley and Davies to the defendant corporation. All of these later deeds also were promptly recorded. Notley as lessee and grantee and his successors in interest as grantees, and they alone, from the time when Notley first entered as above stated until the institution of these proceedings, have had continuous and undisturbed possession of all of the land now in controversy, making such use of it as it was capable of, to wit, in the earlier years as above stated, later as a sheep ranch also and ever since 1878 or 1879, as to portions of it, for the purposes of a sugar plantation.

Service of summons in this action was made November 26, 1897. Upon the undisputed evidence, the defendant and its predecessors in interest had, for a period of more than twenty years next preceding the commencement of this action, possession that was actual and continuous. That possession was also, admittedly, open, notorious, exclusive and hostile as against the whole world other than Kapehe the second (hereinafter called Kapehe) and the grand-children of Kapau. It seems to be further conceded that the possession of Widemann and those following him, that is, beginning with December 2, 1878, had all the elements of an adverse holding. The plaintiff's contention is that there was evidence sufficient to support a finding that as against Kapehe and the grand-children of Kapau the possession of the Nahaoleluas was not hostile, nor open, notorious or exclusive, and that these two men so acted towards the parties

just named as to lead them to believe that the possession was on their behalf and not under claim of absolute ownership. No direct evidence was before the jury of any specific acts or words done or spoken by the Nahaoleluas or either of them which can be construed as a recognition of title in Kapehe or the grandchildren. The evidence, and the only evidence, which has been pointed to as tending to support the verdict, either by showing weakness in the defendant's proof of hostility or as independent proof by the plaintiff of a recognition of title in the true owners, is the following: (1) that P. Nahaolelua was governor of Maui, an intelligent and influential man, and a leader among his people, especially among his own relatives; (2) that in 1871 or 1872, after the decree of 1871, Kapehe and the grandchildren came, by direction of P. Nahaolelua, from Maui, where they were residing, to Honolulu to live with members of the royal family and remained with the latter for some years (Kapehe died May 8, 1877); (3) that for a period of years until 1871, P. Nahaolelua in holding the land acted merely as administrator or as trustee for the true owners; (4) that while in 1872 he purported to lease the whole land, he was in reality not then the owner of Hoomana's one-half and was aware of this fact; (5) that the land was only leased, and not sold, prior to Kapehe's death; (6) that the decree of 1871 was erroneous in law, in that P. Nahaolelua was not of the blood of Kailakanoa and was therefore excluded by the statute from inheriting; (7) the testimony of Mrs. Kia Nahaolelua that, when she demurred to signing the deed to Widemann, her husband said to her that he had better sell because "mahope komo mai na pilikoko" (bye-and-bye the relatives will come in); and (8) the testimony of Mrs. Holt given in these words: "Kapehe never denied Nahaolelua's interest in this land, nor did Nahaolelua deny Kapehe's interest in this land."

The argument is that as the prominent, intelligent man in the family, P. Nahaolelua would be naturally expected by Kapehe to possess and manage the land for the benefit of all the owners and that the lease of 1872 was probably regarded by her as having been an act done partly in her behalf, that he had

her in his control in the family of the *aliis* with whom he stood in close relations, and that the strong probability is that he so acted towards her as not to lead her to suspect that he was claiming title to the land or seeking to build up an adverse claim to it. The same argument is to a certain extent made with reference to Kia. The answer to it all is that it is too shadowy and conjectural to be permitted to uphold a verdict. When a strong showing of acts denoting a claim of ownership has been made, as in the case at bar, a jury cannot be permitted by resort to pure conjecture, to disregard such showing; and this is said with full appreciation of the rule that the burden of proving the element of hostility is upon the party asserting that the possession was adverse. Kapehe, while she made no claim for herself, was present in court in 1871 at the hearing on the subject of heirship, and testified as a witness for Nahaolelua. In the absence of any satisfactory showing to the contrary, the only reasonable inference is that she knew that Nahaolelua was claiming to be heir to one-half and that he recognized Hoomana only as the other heir. The court so decreed and after a contest in two other courts, the decree stood as the law. It was only in these present proceedings that it was declared by a court to be not binding on Kapehe and erroneous. The lease of 1872 was evidence of a claim of ownership, the effect of which, as against Kapehe or the grand-children, cannot be destroyed by showing that in 1874 Nahaolelua purchased of Hoomana her outstanding interest. He knew at the date of the decree that she owned one half, but there is no reason for believing that at that time he knew that as to the others the decree was erroneous or that any other claim, valid or otherwise, was outstanding. Then there is the will executed in June, 1875, and probated the following November before the Circuit Judge of Maui. In that will P. Nahaolelua devised to his son the whole ahupuaa, an absolute gift subject to no trust whatever in favor of Kapehe or of any one else. Whatever attack, weak or otherwise, might be made upon the lease of 1872, if it stood alone, as being capable of being regarded as an act done in subserviency to Kapehe's title, surely no such claim can with reason be urged con-

cerning the will. The devise was a hostile act, and capable of no other construction. The will was probated on the Island of Maui, Kapehe's home, and presumably after publication of notice in accordance with the rules of court then in force. See Probate Rule III, adopted April 27, 1871. Can it be reasonably inferred under the circumstances that Kapehe was not aware of the disposition thus made of Koholalele? We think not.

Kia Nahaolelua's statement to his wife made just prior to the execution of the deed to Widemann, uncommunicated to any one else, cannot be held to be, of itself, a recognition of the title of the true owners or an admission that his possession was not hostile. An adverse possessor may be consciously a wrongdoer, he may be aware of a defect in his title or that a fraction is outstanding. If he asserts title in himself and by his acts or words or both notoriously shows that he is holding under a claim of ownership, adverse possession is accruing. Moreover, to regard Kia's statement as an admission of title such as to interrupt the running of the statute, is rendered impossible by reason of the fact that in spite of that statement and as a part of the same transaction Kia carried out his purpose and executed the absolute deed to Widemann, thus showing the hostile nature of his possession. But, it is urged, his statement at least shows that he and his father had knowledge of the weakness of their title and thus serves to further make room for the theory that they by their conduct deceived Kapehe and the grandchildren into a belief that their possession was not hostile. This contention cannot be upheld. The character of Kia's acts is too clearly fixed by the evidence to permit of being shaken by any such theory based upon the present state of the evidence. The same is, we think, true of P. Nahaolelua's possession. To say that because Kia in December 1, 1878, had such knowledge, therefore P. Nahaolelua must have had it also from 1871 to 1875, is at least a strained conclusion; it is even more strained to say that because the two had that knowledge they created in Kapehe and the grand-children the belief that they were holding for her.

Mrs. Holt's testimony, "nor did Nahaolelua deny Kapehe's interest in this land," is insufficient to show recognition by Nahaolelua of Kapehe's title. The words of the witness are incapable of the construction that "Nahaolelua always (or at any time) admitted Kapehe's interest in the land." To say that he did not deny her title proves nothing and does not in any degree weaken the case made out for the defense.

The evidence relied upon by the plaintiff in this matter is, in our opinion, so very slight and so very unsatisfactory that it is insufficient to sustain the verdict. The evidence of adverse possession, on the other hand, is strong and convincing. In so holding we are not unmindful of the rule, repeatedly laid down in former cases, that a verdict cannot be set aside where there is sufficient evidence to sustain it, but a mere *scintilla* of evidence is not sufficient for that purpose. See *Kamalu v. Lovell*, 5 Haw. 62, 64, in which the Court quoted with approval the following language from *Commissioners v. Clark*, 94 U. S. 284: "Decided cases may be found where it is held that if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." It may be noted, in conclusion, that the Circuit Judge who presided at the trial, in denying the motion for a new trial appears to have acted reluctantly and with much hesitation. In passing on the motion, he characterized the evidence relied upon by the plaintiff as extremely weak and unsatisfactory and that of the defendant as strong and convincing.

Counsel for plaintiff calls attention to the fact that certain evidence was offered by him tending to show that payments of money were made by P. Nahaolelua to Kapehe and claims that the evidence was erroneously excluded and that if it had been admitted it would have been clearly sufficient to sustain the

verdict. Those questions, however, are not now before us and no opinion is expressed thereon.

The verdict is set aside and a new trial ordered.

Kinney, Ballou & McClanahan for plaintiff.

C. Brown for defendant.

CONCURRING OPINION OF FREAR, C.J.

I concur in the foregoing opinion. There can be no doubt, as shown by the opinion in *Capitol Traction Co. v. Hof*, 174 U. S. 1, that the appellate court as well as the trial court may grant a new trial, but there is at common law, in the Federal courts and in most of the State courts a great difference between the powers of such courts in this respect. In general the trial court may set aside a verdict of a jury and grant a new trial when the verdict is decidedly against the weight of the evidence, but an appellate court can do this only when there is error of law. But, as held repeatedly, both here and elsewhere, there is error of law if there is no evidence at all or not enough substantial evidence to support the verdict, that is, where there is such insufficiency of evidence in fact to amount to insufficiency in law. "In such cases the evidence is reviewed in the same manner by both trial and appellate courts." 14 Enc. Pl. & Pr. 784. As to the powers and duties of both appellate and trial courts in granting new trials on the ground of insufficiency of evidence, see *Mt. Adams & E. P. I. R. Co., v. Lowery*, 74 Fed. Rep. 463; *Wright v. So. Exp. Co.* 80 Fed. 85. There is, as recognized everywhere, in this, as in many other classes of cases, no fixed standard of easy application to go by. Each case must be judged by itself. But, while the court of course endeavors to uphold verdicts, it has its duty to perform and must exercise it in proper cases. In this jurisdiction the trial court has not gone so far as the Federal and most other courts elsewhere in setting aside verdicts. As a rule their powers in this respect have been regarded as almost as limited as those of the appellate court. But our Supreme Court has usually followed the practice of appellate courts elsewhere, and accordingly our reports are full of decisions declining to set aside verdicts where

there is sufficient substantial evidence to support them, even when the weight of the evidence has seemed to be against the verdict, but this court has always in what it considered proper cases, though naturally such cases have not been numerous, exercised the power to reverse decisions of the trial court and set aside verdicts when there has not been sufficient evidence to support them. See *Bishop v. Kala* 7 Haw. 590; *Hayselden v. Wahineaea*, 9 Haw. 51; *Knudsen v. Palea*, 10 Haw. 573. On the whole, I am inclined to think that this case is one of those in which this power should be exercised. Some courts go so far as to hold that it is the duty of the appellate court to reverse the decision of the trial court and order a new trial irrespective of its own view as to the sufficiency of the evidence, when the trial judge expresses himself as strongly against the verdict as he did in this case. *Tacoma v. Tacoma L. & W. Co.*, 16 Wash. 317; *State v. Billings*, 81 Ia. 100. This is on the ground that it is the duty of the trial judge to set aside the verdict and order a new trial when he so regards the evidence.

DISSENTING OPINION OF GALBRAITH, J.

I respectfully dissent. To set aside the verdict of the jury on the ground that it is not supported by the evidence is, it seems to me, to fly in the face of the Seventh Amendment to the Constitution of the United States by re-examining a fact or facts tried by a jury in a manner "otherwise than according to the rules of the common law." In order that the majority of this court may reach the conclusion that the evidence does not support the verdict of the jury it was necessary to re-examine the facts submitted to the jury. I do not understand that this can be done. The finding of the jury on the facts is absolutely binding on this court. If there had been no evidence for the plaintiff it would have been the duty of the trial judge to have taken the case from the jury and to have directed a verdict but when the judge determined that there was evidence to go to the jury then the jury became the exclusive judges of its weight and that finding is only subject to review in the manner pro-

vided by the rules of the common law. There was no exception taken to the ruling of the trial judge refusing to direct the verdict. This court can set aside the verdict of a jury for errors of law only.

Mr. Justice Gray in delivering the opinion of the Supreme Court of the United States in *Capital Traction Company v. Hof*, 174 U. S. 1, 13, said: "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, when the value in controversy exceeds twenty dollars, has the right to a trial by jury; that when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable or ordered by an appellate court for errors of law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

It does not seem necessary for me to express an opinion on the other questions raised by the exceptions since the judgment of the majority will remand the cause for a new trial.

R. W. McCHESNEY ET AL. v. KONA SUGAR CO., LTD.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

SUBMITTED MARCH 30, 1903.

DECIDED APRIL 13, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is not an abuse of discretion for a court of equity appointing a receiver to deny, without prejudice, a petition for leave to institute

against the receiver "such appropriate suits as your petitioner shall be advised in the premises," or to fail to indicate, of its own motion, and under a prayer for general relief, the nature of the proceedings which the applicant should institute and the court in which such proceedings should be brought.

OPINION OF THE COURT BY PERRY, J.

The bill in the above entitled suit was brought, before the Circuit Judge of the Third Circuit, for the foreclosure of a lien claimed against the Kona Sugar Co., Ltd., and for the appointment of a receiver of the property of that corporation. Some months after the appointment of the receiver, the Kapiolani Estate, Ltd., presented a petition to the Circuit Judge wherein it alleged that the Kona Sugar Company was the lessee of and that its plantation, mill and other works were situated upon certain lands of the petitioner, that the rent of such lands for a period prior to the date of the appointment of the receiver and also for the time subsequent thereto was due and unpaid, that the company and the receiver refused to pay such rent, that the receiver, by virtue of a certain contract or proposed contract referred to in the petition, has committed or is about to commit a breach of the condition of the lease against assignment, and that by reason of these facts the company has forfeited all right to retain and enjoy the estate created by the lease. The prayer of the petition was that leave be granted to the petitioner "to institute and prosecute to final judgment and execution such appropriate suits as your petitioner shall be advised in the premises" against the company or the receiver or both for the purpose of securing a judgment of forfeiture and a writ of restitution.

Upon the hearing of the petition the court asked counsel for the petitioner whether the petitioner was ready to institute the desired proceedings, whether such proceedings would be at law or in equity and whether in that or in some other court. To each of these questions counsel replied, in effect, that he did not know. The petition was denied "without prejudice to peti-

tioner to take such other proceedings as it may deem meet." From this order the present appeal was taken.

That a receiver cannot be sued or his possession of property held by him as such disturbed, without the permission of the court appointing him, is not disputed by the appellant; nor is it disputed that it is within the judicial discretion of such court to grant or to withhold such permission. Such leave is usually granted unless it appears clearly from the application that the demand has no legal foundation. Beach, Receivers, §652. It would, perhaps, be an abuse of discretion to refuse leave where a probable cause of action is shown. It is also clear that it is discretionary with the court to allow the bringing of an independent action or suit in another court or to compel the party to proceed by petition in the suit in which the receiver was appointed, (Beach, Receivers, §§654, 649; High, Receivers, §254b; *Bank v. Landauer*, 68 Wis. 44) although leave to sue in another court is ordinarily refused if the court having jurisdiction in the original suit is competent to hear and determine the controversy. Beach, §658; High, §254b; *Olds v. Tucker*, 35 O. St. 581. This discretionary power last referred to should not be surrendered or transferred by the court to any party claimant, and yet that is, in effect, what the present applicant in its petition asked the court to do. It certainly was not an abuse of discretion to refuse the permission asked for. It is contended, however, that under the prayer for general relief the court could have indicated what proceedings were, in its opinion, proper to be brought and granted leave accordingly, and the suggestion is made that the applicant would be satisfied with leave to bring an action for summary possession in a District Court or, in the alternative, a petition before the Circuit Judge for an order directing the receiver to pay the rent due or to yield possession. This suggestion is made for the first time in this court; it was not made to the Circuit Judge. The petitioner before the Circuit Judge stood upon his petition as presented and although directly requested to do so failed to inform the court of the nature of the proceedings desired to be instituted or as to what court the action or suit would be brought in. While

it was in the power of the Circuit Judge to specify, of his own motion, what course the applicant should follow concerning these matters and to give leave accordingly, it was not his duty to do so, much less can it be said that by failing to do so he committed an abuse of discretion. His order expressly leaves the Kapiolani Estate, Ltd., at liberty to apply in due form when it has concluded what proceeding it is that it desires to bring.

The order appealed from is affirmed.

C. W. Ashford and *E. A. C. Long* for appellant.

J. W. Cathcart for appellees.

JESSE MAKAINAI v. GOO WAN HOY.

JESSE MAKAINAI v. GOO WAN HOY.

MOTIONS FOR REHEARING.

SUBMITTED MARCH 25, 1903.

DECIDED MAY 20, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The repeal of the provisions of the Federal Stamp Act that required stamps to be placed on promissory notes does not affect notes made before such repeal,—the provisions that impose penalties, make instruments invalid or inadmissible as evidence until stamped and that provide how they shall be stamped afterwards if not stamped when made, not having been repealed.

Instruments not stamped when made can be legally stamped afterwards only as prescribed by law, that is, by going before the Collector.

A rehearing is denied.

OPINION OF THE COURT BY FREAR, C.J.

Two grounds are relied on in support of these motions for a rehearing.

One is that the decision, *ante*, 607, is in conflict with controll-

ing decisions elsewhere that were not called to the attention of the court at the former hearing. The numerous decisions now relied on do not appear to be controlling on this point.

The other ground is that the portion of the Federal statute on which the decision was based has been repealed. This point was suggested by the court at the former hearing and argued by counsel for the defendant in their brief, and was considered by the court, but, as was the case with a number of other questions not then or now presented by counsel, was not touched upon in the opinion for the reason that counsel for the plaintiff did not rely upon them. One answer to this point is that the parts of the statute on which the former decision was based had not been repealed, namely, Sections 7, 13 and 14 of the Act of 1898 (30 Sts. at L. 448). See *Edeck v. Ranuer*, 2 Johns. 423; *Leavitt v. Leavitt*, 4 Me. 161. The provision that required stamps on future instruments had been repealed, but the provisions that imposed penalties, made instruments invalid or inadmissible as evidence until stamped, and that provided how they should be stamped afterwards if they were not stamped originally, had not been repealed.

Just what view the District Magistrate took, it is difficult to say from the meager record sent up. He might have found in one case at least that the omission to stamp was "with intent to evade" the law. But let us assume that he found in each case merely that the notes were not stamped when made. There is sufficient evidence to sustain such a finding. They would then be inadmissible as evidence under Sections 7 and 14 of the Act until they were stamped on application to the Collector under the provisions of Section 13; but they had not been so stamped, and no motion was made for a continuance for the purpose of having them so stamped.

It is true that decisions can be found that hold that documents not originally stamped can be stamped afterwards either in the presence of the court or out of court, as well as before the Collector. But those decisions are either based on former statutes differently worded, or have been so decided inadvertently on the supposition that the present statute was the same as the earlier

statutes. Other decisions are to the effect that under statutes like the present the method provided in Section 13 is exclusive, and such is our opinion. For a review of the changes in the statutes and for decisions on this point under the various statutes, see subdiv. V. a. 1 of note in 48 L. R. A. 314. But this point is not raised even on these motions for a rehearing.

The motions for a rehearing are denied.

Achi & Johnson and *Humphreys & Watson* for plaintiff.

Holmes & Stanley and *J. H. Knight* for defendant.

DISSENTING OPINION OF GALBRAITH, J.

I concur in the order overruling the motion for rehearing for the reason that the grounds on which it is based are not well taken. However, I am convinced, on further investigation, that there was an error in the former judgment that the court of its own motion should correct.

I understand that there are some propositions developed in the construction of the War Revenue Act of 1898, and the earlier Acts of a similar character, that may now be said to be well established by judicial authority, namely, (1) that a note issued without a stamp, while that part of the Act requiring notes to be stamped was in force, is not void unless the failure to stamp was with intent to defraud the revenue and avoid paying the tax, and (2) that no presumption of fraudulent intent arises from a mere failure to stamp an instrument at the date of its issuance. *Harvey v. Wieland*, (Iowa) 88 N. W. 1077; *Steeley's Creditors v. Steeley et al.*, (Ky.) 64 So. W. 642, 643; *Jones v. Western M'fg. Co.*, (Wash.) 67 Pac. 586; *Cassidy v. St. Germain*, (R. I.) 46 Atl. 35; *Rheinstrom v. Cone*, 26 Wis. 163; *Latham v. Smith*, 45 Ill. 29; *McGovern v. Hoesbeck*, 53 Pa. St. 176, 179; *Grant v. The Connecticut Mutual Life Ins. Co.*, 29 Wis. 125, 135; *Desmond v. Norris*, 92 Mass. 250; (3) that where the failure to stamp was through mistake or inadvertence, the instrument may be post-stamped within twelve months after its date, without the payment of penalty, in the discretion of the Collector of Internal Revenue of the District, and at any time

after twelve months by the payment of the penalty; see Section 13, Chapter 806, Act of March 2, 1901, 31 U. S. St. L. p. 941. *Harvey v. Wieland*, and *Jones v. Western M'fg. Co.* supra; and (4) that the failure to cancel the stamp as required by the Act does not affect the validity of the instrument or its admissibility in evidence. *Doffin v. Guyer*, 39 Ind. 215; *Goodwin v. Wanz*, 25 *id.* 101; *Adams v. Dole*, 29 *id.* 273; *Long v. Spencer*, 78 Pa. St. 303, 307; *Miller v. Wentworth*, 82 *id.* 280, 287; *St. Louis and C. R. R. Co. v. Eakins*, 30 Iowa 279; *Union Agricultural and Stock Association v. Neill*, 31 *id.* 95; *De Armond v. Dubose*, 22 La. Ann. 131 (2 AM. Rep. 718); *Desmond v. Norris*, 92 Mass. (10 Allen) 250; *Shultz v. Haddon*, 32 Texas 390; *Jacobs v. Cunningham*, 32 *id.* 774; *Chaplin v. Horton*, 36 Vt. 684; *Lerch v. Snyder*, 112 Pa. St. 161, 167.

While the record does not show that the Magistrate made any finding on the question of fraudulent intent, I presume that he found, as he might have done, an intent to defraud the revenue, in the one case, from the use of cancelled stamps,—the case where the stamps bore the cancel mark of Bishop & Co., of a year prior to date of the note. In that case the judgment for the defendant ought to be sustained. In the other case where the correct amount of stamps were attached to the note and the cancellation was with cross, made with pen and ink, the judgment should have been for the plaintiff. The failure to cancel the stamps as required by the law did not render the note void or inadmissible in evidence. No intention to defraud could be inferred from the mere failure to cancel the stamps and to date and initial the cancellation. The judgment for the defendant in that case was error, and should be set aside.

The former judgment rendered in these cases ought to be modified as follows: The appeal in the one case, that where the stamps were cancelled with pen, should be sustained and the cause remanded to the District Magistrate with direction to set aside the judgment for the defendant and for further proceedings.

IN RE ASSESSMENT OF TAXES, HAWAIIAN COMMERCIAL AND SUGAR COMPANY, LIMITED.

MOTION FOR REHEARING.

SUBMITTED MARCH 30, 1903.

DECIDED MAY 20, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The provision of the income tax law that "no deduction shall be made for any amount paid out for new buildings, permanent improvements or betterments made to increase the value of any property or estate," does not imply that deduction may be made for all amounts so paid out which do not in fact increase the value of the property.

The loss of an old mill, in good condition, by voluntary abandonment because of the erection of a larger mill in a different location on account of the enlargement of the plantation, is not an "expense" within the meaning of the income tax law.

A rehearing is denied.

OPINION OF THE COURT BY FREAR, C.J.

This is a motion for a rehearing in the case decided February 19, 1903, (*ante*, 601). The question was whether, in computing the income of the corporation for the purposes of the income tax, the value of an old mill and railroad should be deducted, they having been replaced by a new mill and road.

The several grounds chiefly relied on now are closely related, and are to the effect that although the appellant relied in its return and before the tax appeal court on the provision of the statute which allows a deduction for "losses otherwise actually incurred," it is not thereby precluded on this appeal from relying on certain other provisions of the statute, which it is now contended were presented by counsel but overlooked by the court in its former decision.

One of the other provisions is that "no deduction shall be made for any amount paid out for new buildings, permanent improvements or betterments made to increase the value of any property or estate." The argument seems to be that, as the amount paid for the new mill actually increased the value of the plantation only to the extent that that amount exceeded the value of the old mill, the amount paid for the new mill up to the value of the old mill should not be considered as paid out for permanent improvements to increase the value of the plantation, and therefore should be deducted. There are assumptions of fact in the argument that are at least questionable, but, overlooking these, it may be said that it does not follow that, because no deduction can be made for expenditures for new buildings, &c., made to increase the value, &c., deductions can be made for expenditures for new buildings that do not increase the value, &c. It is immaterial, for the purposes of the income tax, how much is expended for new buildings, &c., or how much or little the value of the estate is increased thereby. The question is, what is the net income. This is found by deducting the expenses from the gross income. What is expended for permanent improvements is not expense. The tax is levied upon the income, not upon the increase in value of the estate. The value of the estate is constantly changing, owing to many causes, and in so far as it is affected by capital expenditure, it may be increased to the full amount of such expenditure, or to more or less than that amount. Not only would it be impracticable to determine the amount of income by the amount of increase in the value of the estate, but the statute does not permit that, nor would it be practicable or reasonable to deduct what has been expended without the expected result of a corresponding increase in value, nor was there evidence introduced in this case that would justify an attempt at such an estimate. The provision is that no deduction can be made for expenditures made to increase, that is, for the purpose, not with the result of increasing the value, and, moreover, it does not, conversely, allow deductions for all expenditures made not to increase the value or made unsuccessfully to increase the value of the estate. The real question is, whether the expenditure for

the new mill, up to the value of the old, may be considered as an expense as distinguished from capital expenditure. This brings us to the other provision of the statute now relied on.

"In computing income, the necessary expenses actually incurred in carrying on any business," &c., "shall be deducted." This provision of the statute might apply if the old mill had given out so that it was practically necessary to erect a new mill on that account. The amount expended in the new mill up to the extent not merely of the value of the old mill, but of the amount that would be required to put the old mill in good repair or to replace it, might perhaps be deducted as an expense. But such was not the case here. As shown by the appellant's own witnesses, the old mill was in good condition, and was voluntarily abandoned, and the new mill was erected solely in order to have a larger mill and in a different location on account of the enlargement of the plantation.

It may be that these points were not treated as explicitly as they should have been in the former opinion, but they were necessarily considered by the court, and the reasoning of the opinion would seem to dispose of them. However, especially in view of the extended argument of counsel, we have thought it proper to express our views upon these points more in detail.

The motion for a rehearing is denied.

Smith & Lewis and *L. J. Warren* for the taxpayer.

Robertson & Wilder for the assessor.

Decisions Announced without Opinions During the Period Covered by this Volume.

No. 19. TERRITORY OF HAWAII *v.* WING TUNG. Appeal from District Court, South Hilo. Submitted January 6, 1902. Decided January 6, 1902. Forfeiture of spirituous liquors under Section 455, Penal Laws. Appeal by defendant. *Per Curiam*. Judgment appealed from reversed. Case remitted to District Court with instructions to sustain defendant's demurrer, and for such further proceedings, if any, as may be proper. *Attorney General E. P. Dole* for prosecution. *Thos. Fitch* and *W. S. Wise* for defendant.

No. 35. *In re* ASSESSMENT OF TAXES, JULIA K. HUNT AND BECKY A. HUNT. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 6, 1902. Decided January 18, 1902. Two pieces of land at Iwilei, Oahu: (a) one third of an acre, returned, with improvements, at \$1200, assessed at \$4800; (b) two thirds of an acre, returned, with improvements, at \$2000, assessed at \$9600. Both pieces, with improvements, jointly valued by Tax Appeal Court at \$7200. Appeal by Assessor. *Per Curiam*. Valuation fixed by Tax Appeal Court affirmed. *Robertson & Wilder* for Assessor. *Peterson & Matthewman* for tax-payer.

No. 38. *In re* ASSESSMENT OF TAXES, JAMES CAMPBELL ESTATE. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 6, 1902. Decided January 18,

1902. (1) Property fronting on Hotel and Front streets, Honolulu, containing an area of 26,437 square feet. Returned at \$75,000; assessed at \$150,000 and reduced by the Tax Appeal Court to \$129,554. (2) Property on Emma street, Honolulu, containing an area of 5.21 acres. Returned at \$30,000; assessed at \$75,000 and reduced by Tax Appeal Court to \$50,000. Appeal by the Assessor. *Per Curiam*. On the first item the appeal is sustained, and the valuation of said property is fixed at \$133,554. On the second item, valuation of the Tax Appeal Court is affirmed. Perry, J., dissenting as to the first item: Valuation by Tax Court should be affirmed. *C. Brown* for taxpayer. *Robertson & Wilder* for Assessor.

No. 39. *In re* ASSESSMENT OF TAXES, JOHN PULAA. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 6, 1902. Decided January 18, 1902. About four acres at Kalihi, Honolulu, R. P. 672, L. C. A. 1541. Returned at \$1500; assessed at \$8000. Valued by Tax Court at \$3000. Appeal by Assessor. *Per Curiam*. Valuation placed at \$4000. Perry, J., dissenting: Valuation by Tax Court should be affirmed. *Robertson & Wilder* for Assessor, appellant. *J. A. Magoon* and *T. I. Dillon* for tax-payer.

No. 40. *In re* ASSESSMENT OF TAXES, MARY A. GRAEME. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 6, 1902. Decided January 18, 1902. Land N. E. corner Kaahumanu and Queen streets, Honolulu. Frontage, Kaahumanu street 146 feet, Queen street 97 1-2 feet. Area, 12,850 square feet. Property subject to lease expiring in 1919, at a rental of \$2000 per annum. Returned at \$20,000; assessed at \$140,000. Valuation fixed by Tax Appeal Court, \$20,000. In this court the Assessor claims a valuation of \$75,000, and the tax-payer concedes a value of \$45,000, subject to the lease. *Per*

Curiam. Valuation fixed at \$45,000. *Robertson & Wilder* for Assessor. *C. Brown* for tax-payer.

No. 41. *In re* ASSESSMENT OF TAXES, C. K. C. ROOKE. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 7, 1902. Decided January 18, 1902. Land at Honuakaha, Honolulu, containing an area of 196,891 square feet. Returned at \$2800; assessed at \$35,000, and valued at \$2800 by Tax Appeal Court. Appeal by the Assessor. *Per Curiam.* The appeal is sustained on authority of *In re Assessment of Taxes, Emily K. Mehrten*, 13 Haw. 677, and the valuation of said property fixed at \$25,000. *Atkinson & Judd* for tax-payer. *Robertson & Wilder* for Assessor.

No. 42. *In re* ASSESSMENT OF TAXES, M. S. GRINBAUM & Co., LIMITED. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 13, 1902. Decided January 18, 1902. Stock of merchandise, returned at \$124,842.82; assessed at \$184,842.82. Valued by Tax Appeal Court at amount returned. Appeal by Assessor. *Per Curiam.* Value placed at \$150,000. *Robertson & Wilder* for Assessor. *Hatch & Silliman* for tax-payer.

No. 45. *In re* ASSESSMENT OF TAXES, KAPIOLANI ESTATE, LIMITED. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 8, 1902. Decided January 17, 1902. (1) 4.23 acres, south side of Wilder Avenue, between Keeaumoku and Makiki streets, Honolulu, subject to lease for 20 years from May 11, 1896, at annual rental of \$400. Returned at \$3200; assessed at \$24,000. Valued by Tax Court at \$3200. (2) 11,325 square feet, north corner of King and Alakea streets, Honolulu. Returned at \$30,000; assessed at \$40,000. Valued by Tax Court at \$30,000. (3) 162.61 acres, Mokauea, Kalihi,

Honolulu. Returned at \$50,000; assessed at \$300,000. Valued by Tax Court at \$97,200. Appeal by Assessor. Appeal by taxpayer as to other items abandoned. *Per Curiam*. The first lot is valued at \$10,000. See *Bishop Estate* case, 13 Haw. 671. The valuations of the second and third lots by the Tax Court at \$30,000 and \$97,200, respectively, are affirmed. Valuations of other lots, as to which the tax-payer appealed, are affirmed. *Robertson & Wilder* for Assessor. *Kinney, Ballou & McClunahan* for tax-payer.

No. 46. *In re* ASSESSMENT OF TAXES, S. C. ALLEN. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 7, 1902. Decided January 18, 1902. Tract of land at Makiki, Honolulu, Oahu, now used as pasturage, but suitable for house lots. Total area, 18 1-2 acres; available for house lots, exclusive of roads and certain ditches, 14 1-2 acres. Returned at \$50,000; assessed at \$90,000. Valuation fixed by Tax Appeal Court, \$77,000. Appeal by Assessor. *Per Curiam*. Valuation appealed from affirmed. *Robertson & Wilder* for Assessor. *Holmes & Stanley* for tax-payer.

No. 47. *In re* ASSESSMENT OF TAXES, ANTONE MANUEL. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 7, 1902. Decided January 18, 1902. (1) 15,800 square feet, north corner Nuuanu and Pauahi streets, Honolulu. Returned at \$12,000; assessed at \$30,000. Reduced by the Tax Court to the amount of the return. (2) 45,990 square feet, Pauoa, Honolulu. Returned at \$6000; assessed at \$8500. Reduced by Tax Court to the amount of the return. Appeal by Assessor. *Per Curiam*. The appeal is sustained on the first piece on the authority of *In re Assessment of Taxes of Mehrten*, 13 Haw. 677, and the valuation of said property fixed at \$24,000, and as to the second piece, the decision of the Tax Appeal Court is affirmed fixing the valuation of the property at \$6,000. Perry,

J., dissenting as to first piece: Valuation should be \$15,000. *J. A. Magoon* and *T. I. Dillon* for tax-payer. *Robertson & Wilder* for Tax Assessor.

No. 49. *In re* ASSESSMENT OF TAXES, JOHN II ESTATE, LIMITED. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 7, 1902. Decided January 18, 1902. (1) 34,547 acres, south corner King and Waikiki streets, Pawaa, Honolulu. Returned at \$40,000; assessed at \$70,000. Valued by Tax Court at \$70,000. (2) 4.02 acres, north side of, but not fronting on, Waikiki road, Pawaa, Honolulu. Returned at \$2000; assessed at \$5000. Valued by Tax Court at \$5000. (3) 8000 acres, pasture land, Ewa, Oahu. Returned at \$24,000; assessed at \$40,000. Valued at \$40,000. Appeal by tax-payer. *Per Curiam*. Valuation of first piece placed at \$50,000. Valuations of other pieces by Tax Appeal Court affirmed. Perry, J., dissenting as to first piece: Valuation should be \$40,000. *J. A. Magoon* and *T. I. Dillon* for tax-payer. *Robertson & Wilder* for Assessor.

No. 50. *In re* ASSESSMENT OF TAXES, A. HOCKING. Appeal from Tax Appeal Court, First Taxation Division. Submitted January 7, 1902. Decided January 18, 1902. Land on northwest corner of Nuuanu and King streets. Frontage on King street, 140 feet, and on Nuuanu street, 110 feet. Brick buildings used as stores on the property. Total rental at date of assessment, \$505 per month, or \$6060 per year. In 1899 the present owner, who at that time held a lease on the whole property, with 25 years of the term unexpired, at a rental of \$100 per month, purchased an undivided 19-36 interest for \$15,000. Returned at \$40,000; assessed at \$75,000. Assessment sustained by Tax Appeal Court. *Per Curiam*. Valuation fixed at \$75,000. Perry, J., dissenting: Valuation should be \$48,480.

Robertson & Wilder for Assessor. *Magoon & Dillon* for taxpayer.

No. 57. *In re* ASSESSMENT OF TAXES, MRS. B. M. ALLEN. Appeal from Tax Appeal Court, First Taxation Division. Submitted February 24, 1903. Decided February 24, 1903. Land on Kewalo street, Makiki. Area, 6 acres. Returned at \$20,000; assessed at \$36,000. Valued by Tax Court at \$27,910. Appeal by Assessor. *Per Curiam*. Valuation appealed from affirmed.

No. 58. *In re* ASSESSMENT OF TAXES, S. C. ALLEN. Appeal from Tax Appeal Court, First Taxation Division. Submitted February 24, 1903. Decided February 24, 1903. Land on Kewalo street and Wilder avenue, Makiki. Area, 11 44-100 acres. Returned at \$40,000; assessed at \$69,000. Valued by Tax Court at \$42,090. Appeal by Assessor. *Per Curiam*. Valuation appealed from affirmed.

No. 60. H. HACKFELD & Co., LTD., v. HILO RAILROAD Co., LTD. Error to Circuit Court, Fourth Circuit. Submitted April 22, 1902. Decided April 23, 1902. Motion by defendant to quash the writ of error for the reason that the same issued before the bond required by Section 1450 C. L. was filed. *Per Curiam*. For the reason stated the motion is sustained and the writ is quashed. (Frear, C. J., disqualified, did not sit.) *Kinney, Ballou & McClanahan* for the plaintiff. *Hatch & Silliman, Smith & Parsons* for defendant.

No 65. *In re* ASSESSMENT OF TAXES, M. W. McCHESNEY & Sons. Appeal from Tax Appeal Court, First Taxation Division. Submitted February 27, 1903. Decided March 3, 1903. Lessee's interest in land and buildings, known as Anthon

Premises, situate on Queen street, near Kaahumanu. Lease dated January 11, 1899; term, as returned, twenty years; rent reserved, \$150 per month; rental value, \$250 per month. No value stated in return; assessed at \$22,765. Valued by Tax Court at \$8000. Appeal by Assessor. *Per Curiam*. Even assuming that, as contended by the Assessor, the provision in the lease rendering it terminable, at the will of the lessor, at any time after July 1, 1904, upon certain conditions, cannot be considered, since the lessee did not mention it in his return, the valuation appealed from is affirmed.

No. 66. *In re* ASSESSMENT OF TAXES, ORPHEUM COMPANY, LIMITED. Appeal from Tax Appeal Court, First Taxation Division. Submitted February 25, 1903. Decided March 2, 1903. Land and buildings, known as Orpheum Premises, situate on Fort street, above Beretania street. Area, 38-100 acre. Returned at \$50,000; assessed at \$72,485. Valued by Tax Court at \$50,000. Appeal by Assessor. *Per Curiam*. Valuation appealed from affirmed.

No. 69. *In re* ASSESSMENT OF TAXES, J. F. COLBURN. Appeal from Tax Appeal Court, First Taxation Division. Submitted February 25, 1903. Decided February 25, 1903. Land on Kinau and Lunalilo streets. Area, 60,000 square feet. Returned at \$5000; assessed at \$10,000. Valued by Tax Court at \$9000. Appeal by Assessor. *Per Curiam*. Valuation appealed from affirmed.

No. 70. ANNA GERTZ, IN HER OWN BEHALF AND AS EXECUTRIX OF THE WILL OF CHRISTIAN GERTZ, DECEASED, *v.* J. ALFRED MAGOON IN HIS PERSONAL CAPACITY AND AS TRUSTEE FOR C. H. BANNING AND B. R. BANNING, JOHN BUCKLEY AND MARIA J. FORBES. Appeal from Circuit Judge, First Circuit. Submitted February 26, 1903. Decided March 6, 1903. On April 6, 1901,

the complainant filed a bill in equity praying, *inter alia*, that a certain mortgage, dated December 11, 1894, and the foreclosure thereof, had in January, 1896, be declared null and void. Demurrers to the bill were sustained and the bill dismissed in June, 1901. From that decree no appeal was noted, nor were any other steps taken by the complainant until March 31, 1902, on which date a motion for a re-hearing on the demurrer and for leave to amend the bill was filed. The motion was denied on the ground that the proposed amendment discloses no cause for equitable relief. It is from the last mentioned order that the present appeal was taken. *Per Curiam*. The order appealed from is affirmed. Re-hearing denied May 18, 1903.

No. 98. C. C. KENNEDY *v.* F. M. WAKEFIELD. Appeal from Circuit Judge, Fourth Circuit. Submitted March 17, 1902. Decided April 23, 1902. Delinquent taxes declared to be a first lien and included in decree of foreclosure of mortgage without proper allegations or parties. Appeal by the plaintiff. *Per Curiam*. On authority of the decision in *Theo. H. Davies & Co., Ltd., v. F. M. Wakefield* (*ante* p. 201), the decree appealed from is reversed and the cause remanded. *Smith & Parsons* for the plaintiff. No brief for defendant.

RESOLUTION.

WHEREAS, It has pleased Almighty God to remove by death GEORGE HONS, Esquire, a member of the bar of this court;

RESOLVED, That, deeply deploring our loss, we desire to place on record our kindly remembrance of our departed friend and brother; and to tender to the family of the deceased our sincere sympathy; and that the Court be moved to enter these resolutions upon the records of the court.

On motion on behalf of the bar, the foregoing was ordered spread upon the records of the Supreme Court on March 25, 1903.

HENRY SMITH, Clerk.

INDEX.

ABATEMENT.

Pendency elsewhere of a subsequent action on life insurance policy is no ground for the abatement of the prior action here. *Brown v. Equit. Life A. Co. of U. S.*, 80.

ACCOUNTS.

1. A suit in equity for an accounting between principal and an agent occupying a fiduciary relation does not violate right to a jury trial under constitution of 1894 if the accounts are long and complicated. *Kawananakoa v. Puahi*, 72.

2. In a suit for accounting between principal and agent, a court of equity may determine questions of lawfulness of discharge and compensation. *Ibid.*

3. An ordinary, continuous book account is an entire claim and cannot be split for the purpose of bringing several actions on the different parts. *Lewers & Cooke v. Redhouse*, 290.

4. An action on a part of a book account bars a later action on the remainder. *Lewers & Cooke v. Redhouse*, 290; *Phillips v. Lun Chong Co.*, 295.

5. A guardian who mixes trust funds with his own and keeps no satisfactory separate account should be charged interest upon money allowed to lie idle an unreasonable time. *In re Guardianship of Hoare*, 443.

ACTIONS.

1. An action on a life insurance policy is transitory and need not be brought at place where policy is payable. *Brown v. Equit. Life Ass. Co. of U. S.*, 80.

2. An ordinary, continuous book account cannot be split for the purpose of bringing several actions on the different parts. *Lewers & Cooke v. Redhouse*, 290.

3. An action is "commenced" in the meaning of the mechanics' lien law when the complaint has been filed and summons issued with the intent that it be served promptly. *Hackfield & Co. v. Hilo R. R. Co.*, 448.

4. See ABATEMENT, ASSUMPSIT, BANKRUPTCY, EJECTMENTS, REPLEVIN, HABEAS CORPUS, MANDAMUS, WRIT OF PROHIBITION.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

A decree of the Supreme Court in admiralty will not be set aside because the decree appealed from was made by the successor of the judge who tried the case and made decision. *Hind v. Wilder's S. S. Co.*, 215.

ADULTERY.

1. In a prosecution for adultery, an admission by one that she was married, is competent and sufficient evidence of marriage as against herself, but not as against her codefendant. *T. of H. v. Castro*, 13.
2. Evidence held to not necessarily prove adultery. *Rickard v. Rickard*, 68.

ADVERSE POSSESSION.

1. Where one is shown to have been for statutory period in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile. *Albertina v. Kapiolani Estate*, 321; *Kapiolani Estate v. Cleghorn*, 330; *Smith v. Hamakua Mill Co.*, 669.
2. The provisions of Art. 39 of the Constitution of 1864 that the "King's private lands and other property are inviolable," did not prevent the statute of limitations from operating upon such lands. *Kapiolani Estate v. Cleghorn*, 330; *Kapiolani Estate v. Kaneohe Ranch Co.*, 645.
3. Evidence held to prove adverse possession. *Kapiolani Estate v. Kaneohe Ranch Co.*, 643.
4. A mere scintilla of evidence is insufficient to support a verdict. *Smith v. Hamakua Mill Co.*, 669.

AGENT.

1. Where a fire insurance policy provides that no agent of the insurance company except an officer of the company shall have power to waive any provision or condition of the policy unless such waiver be written upon or attached to the policy, there may be no proof of an oral waiver by an agent of a provision of the policy. *Boardman v. Fireman's Fund Ins. Co.*, 21.
2. A principal may maintain a bill in equity for an accounting against an agent occupying a fiduciary relation. *Kawananakoa v. Puahi*, 72.
3. In a suit for accounting between principal and agent, a court of equity may determine questions of lawfulness of discharge and compensation. *Ibid.*
4. A party who, with full knowledge of facts connected with making of a contract by her agent, accepts a part of the benefits accruing from such contract, thereby ratifies the contract as a whole,

AGENT—Continued.

and has no right thereafter to complain of the acts of the agent as contrary to instructions. *Montano v. Castle*, 362.

5. Where a principal accepts benefits of an unauthorized act of an agent in ignorance of the circumstances he is absolved from liability by reason of supposed assent to the unauthorized act. *Ibid.*

6. General words in a power of attorney must be construed with reference to the specified objects to be accomplished. *Harrison v. Magoon*, 418.

ALIMONY.

1. An order in equity for temporary maintenance is appealable and can not be enforced by contempt proceedings pending an appeal. *Dole v. Gear*, 554.

2. Alimony may be awarded in gross. *Nobriga v. Nobriga*, 152.

3. It is not necessary to use tables of mortality and annuities in determining amount of alimony in gross. *Ibid.*

4. An excessive amount of alimony payable within too short a time may be set aside. *Ibid.*

5. As a rule allowances of alimony in gross are less than one-third the estate and the amount of wife's property is taken into account. *Ibid.*

AMENDMENT.

1. A court may refuse an amendment which substitutes one or more persons for the sole party defendant. *Ter. of Hawaii v. Yim You*, 112.

2. A motion to amend assignments of error in a writ of error is made too late when made pending hearing on a motion for rehearing. *Orpheum Co. v. Dimond & Co.*, 577.

3. Where service of a garnishee is defective because the copy delivered him lacks the seal of the court and signature of the clerk, there can be no amendment of the process so as to give the court jurisdiction of the garnishee. *Hayashi v. Iwata*, 627.

APPEALS.

1. Improper acts of a judge in keeping jury out after they had reported that they could not agree, and improper charges, are not subject to revision on appeal where no objection to such acts and charges were made before the verdict was rendered. *Hitchcock v. Haw. Tramway Co.*, 137.

2. Appeal will not be dismissed for want of transcript of evidence when evidence is not necessary to enable the court to dispose of the appeal on its merits. *In re Estate of Holt*, 164.

3. A decree in admiralty by the Supreme Court on appeal will not be set aside on the ground that the decree appealed from was not made by the judge who tried the case and made the decision, but by his successor in office. *Hind v. Wilder's S. S. Co.*, 215.

APPEALS—Continued.

4. Where an illegal sentence has been imposed, a case may be remanded to the trial court with directions for imposition of a legal sentence. *Territory of Hawaii v. Savidge*, 286.

5. Constitutional right to jury trial is not denied to parties before District Magistrates as a jury trial is obtainable by appeal to Circuit Court. *Lewers & Cooke v. Redhouse*, 290.

6. A certificate of a District Magistrate that an appeal was duly noted upon a certain point of law, is sufficient to raise that point of law before the Supreme Court, though it does not appear otherwise, that the point of law appealed upon was raised before the magistrate. *Lewers & Cooke v. Redhouse*, 290; *Ming Hym v. Young Tong*, 300.

7. An appeal will not be dismissed because the appeal bond runs to the court instead of the clerk but an amended bond will be ordered filed. *Phillips v. Lun Chong Co.*, 295.

Points of law held to be stated sufficiently clearly. *Phillips v. Lun Chong Co.*, 295.

8. A notice of intention to appeal is not a notice of appeal, and a notice of appeal filed after statutory time will not be regarded as an amendment of a notice of intention to appeal filed before the expiration of that time. *Makaio v. Adamu*, 411.

9. Word "appeal" in statute creating Commissioner of Fire Claims construed to mean any proceeding for reviewing and correcting the judgment of an inferior tribunal. *Liverpool, London & Globe Ins. Co. v. Macfarlane*, 481.

10. Appeals do not lie in divorce cases. *Nobrega v Nobrega* 502.

11. A party may appeal in person or by a new attorney from an order in respect to counsel fees in which her interests and her attorney's are adverse. *Ibid.*

12. Where no transcript of testimony is in the record the Supreme Court will not consider whether a Circuit Judge has abused his discretion in ordering an execution to issue pending an appeal. *Orpheum Co. v. Dimond & Co.*, 552.

13. A District Magistrate may not issue an execution in a case involving over \$20, pending an appeal to the Circuit Court. *Wong Chow v. Dickey*, 524.

14. An order in Equity for alimony *pendente lite* is appealable. It is final in its nature. *Dole v. Gear*, 554.

15. A taxpayer is entitled to an appeal when a return is filed and either the amount of the property is increased from the return or the character of the property is changed so that it is subject to a greater taxation. *In re Taxes May & Co.*, 639.

16. An appeal in an equity case brings up for review interlocutory orders and matters within discretion of trial judge. *Lee Chu v. Noar*, 648.

APPEALS—Continued.

17. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge at Chambers. *Silva v. Souza* 46.

18. Where a District Magistrate sends up certificate of appeal and record three years after the appeal is perfected and judgment by default is rendered against defendant without notice of sending up of appeal or of hearing, until execution is issued, it is an abuse of discretion to refuse to vacate the judgment on motion. *Vivas v. Akoni*, 115.

19. See EXCEPTIONS, WRIT OF ERROR.

APPEARANCE.

1. A garnishee can not give a court jurisdiction over it by entering its appearance. *Hayashi v. Iwata*, 627.

2. A general appearance in a case is a waiver of any defect in a published notice to appear. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50

APPROPRIATIONS.

1. Act 10, Laws of 1901, made no appropriation for payment of bailiffs. *First Judge v. Auditor*, 393.

2. The provision of the salaries appropriation act of 1901, that no person holding more than one office shall draw more than the salary of the highest office if it amount to \$1200 a year, applies where the salary of one such office is payable under that act and the salary of the other under the current expense act. It applies to deputy sheriffs, public land agents and inspectors of elections, but not to public school teachers and clerks of election precincts. *Appeal of Cooper*, 282.

ARBITRATION.

1. An agreement to arbitrate which is general and does not make arbitration a condition precedent to the right to sue, does not prevent suit without arbitration. *Hind v. Low*, 438.

ARREST.

1. An arrest without warrant legal where officers see offense of selling liquor without a license committed. *Ter. of Hawaii v. Sing Kee*, 586.

ASSAULT AND BATTERY.

1. One who is entitled to possession of real property but out of possession may not use force to recover possession. *Territory of Hawaii v. Savidge*, 286.

2. Evidence held sufficient to justify jury in finding that party assaulted was officer in discharge of his duty and that defendant knew it. *Territory of Hawaii v. Cheong Jim Cheong*, 610.

ASSUMPSIT.

1. It is error to grant motion of non-suit in action of assumpsit for medical services where answer admits all facts except value of services. *Armitage v. Bishop*, 134.
2. Attorneys' commissions presumably should not be included in determining whether a District Magistrate has jurisdiction. *Lewers & Cooke v. Redhouse*, 290.
3. A Circuit Court on an appeal in action of assumpsit from a District Magistrate should not award attorneys' commissions on amount of judgment of District Magistrate. *Sun v. Makainai*, 495.
4. Proper action for trustee in bankruptcy seeking to recover preference. *Thayer v. Lidgate*, 544.
5. Not barred by decree dismissing bill for specific performance in suit in which question of damages was not raised. *Paris v. Magoon*, 612.

ATTACHMENT.

A defendant in an attachment suit who by paying the debt sued on before return day secures the discharge of the attachment may not recover damages in a suit on a bond to pay damages "in case the attachment should be dissolved, by competent authority before final judgment." *Brown v. Haw. Supply Co. Ltd*, 463.

ATTORNEYS AT LAW.

1. \$100—not \$250—proper fee for attorney who is guardian of a spendthrift for defending suit to terminate guardianship. *In re Estate of Kapukini*, 204.
2. Fees allowed by Equity Judge to attorneys for plaintiff in suit on behalf of stockholders to recover promoters fees fraudulently taken by them, reduced from \$20,000 to \$7,500. *Hitchcock v. Hustace*, 232.
3. Attorneys' commissions should not be included in determining whether a District Magistrate has jurisdiction of a case. *Lewers & Cooke v. Redhouse*, 290.
4. Whether defendant in suit for malicious prosecution acted on advice of counsel in good faith without malice is peculiarly a matter for the jury. *Ahmi v. Cornwell*, 301.
5. The Supreme Court will not on mere suggestion of counsel look into conduct of counsel out of the presence of the Court. *In re Kapukini*, 319.
6. Application should be made to Circuit Judge for allowance of advances made by counsel to a spendthrift under guardianship. The Supreme Court passes upon such matters only on appeal. *Ibid*.
7. A Circuit Court on appeal from a District Magistrate in action of assumpsit can not award attorneys' commissions on amount recovered before the District Magistrate as well as attorneys' commission on amount recovered in Circuit Court. *Sun v. Makainai*, 495.

ATTORNEYS AT LAW—Continued.

8. An appeal may be taken by a party in person or by a new attorney without a substitution of attorneys of record from an order in respect to counsel fees in which her interests and her attorney's are adverse. *Nobrega v. Nobrega*, 502.
9. A court of equity should not allow defendant an attorney's fee on dissolution of a temporary injunction without proof of payment of such fee by defendant. *Kaikainahaole v. Allen*, 527.

AUCTION.

In partition sale when six parcels of land are sold for \$29,205, and one lot sold twice for \$3,000 besides, the auctioneer's fee should not exceed \$450. *Schlieff v. Clark*, 78.

BAILIFFS.

Act 10, Laws of 1901, made no appropriation for payment of bailiffs. *First Judge v. Auditor*, 393.

BANKRUPTCY.

1. To constitute a voidable preference, the preferred creditor must have had reasonable cause to believe that the debtor was insolvent at the time it was given. *Fairer v. H. Hackfeld & Co., Ltd.*, 209.
2. Evidence held not to satisfactorily show that creditor had reasonable cause to believe debtor insolvent. *Ibid.*
3. A trustee in bankruptcy cannot recover from a creditor an amount paid by a guarantor of a debt of the bankrupt. *Ibid.*
4. The Territorial courts, and not the United States District Court, have jurisdiction of suits by a trustee in bankruptcy to recover a preference. *Thayer v. Lidgate*, 545.
5. Equity has no jurisdiction over a suit by a trustee in bankruptcy to recover money paid by the bankrupt to a creditor as a preference. *Ibid.*

BEACH.

1. Kamehamcha V. had power to make grant of land between high and low water mark. *Territory of Hawaii v. Liliuokalani*, 88.
2. Do Kam. II. *Brown v. Spreckels*, 399.
3. Any public right of bathing is subordinate to any other lawful use which the littoral owner may desire to make of the beach. *Territory of Hawaii v. Liliuokalani*, 88.
4. The word "beach" may be used in a deed in a popular sense denoting not only the space between high and low water mark, but part of the adjoining land. *Brown v. Spreckels*, 399.

BILL OF EXCEPTIONS, see EXCEPTIONS.**BILLS AND NOTES, see NEGOTIABLE INSTRUMENTS.**

BOARD OF HEALTH.

1. The Board of Health is not authorized to declare that a nuisance which is not one in fact. *Akwai v. Royal Ins. Co.*, 533.
2. A resolution of a Board of Health that a building should be destroyed as a nuisance, made without notice to the owner, will not bind him in a suit for insurance. *Ibid.*

BONDS.

1. An appeal will not be dismissed because the appeal bond runs to the court instead of the clerk, but an amended bond will be ordered filed. *Phillips v. Lun Chong Co.*, 295.
2. A defendant in an attachment suit who, by paying the debt sued on before the return day, secures the discharge of the attachment, may not recover damages in a suit on a bond to pay damages "in case the attachment should be dissolved by competent authority before final judgment." *Brown v. Haw. Supply Co., Ltd.*, 463.
3. A condition in a trust deed securing bonds requiring assent of a majority of bondholders to compel the trustees to foreclose for default in payment of interest, does not make the buying of a bond by a guardian a delegation of authority and improper. *In re Guardianship of Parker*, 347.
4. A purchase of bonds by a guardian from a corporation of which he is a director and treasurer is voidable at the election of the guardian ad litem of the ward. *Ibid.*

BOUNDARY COMMISSIONERS.

The Boundary Commissioners determine boundaries as they were in 1848 at the time of the "Mahele." *T. of H. v. Liliuokalani*, 88.

BREACH OF PROMISE.

1. \$2,500 held not excessive damages. *Brown v. Bannister*, 34.
2. Seduction subsequent to promise to marry does not make original contract to marry void as based on an immoral consideration. *Brown v. Bannister*, 34.

CANCELLATION OF INSTRUMENT.

1. A lease by an inexperienced young man with little business ability to a capable business man for an inadequate consideration, the weaker trusting the former to protect his interest, will be cancelled by a court of equity. *Hall v. Winam*, 306.
2. A cancellation of an agreement may be good consideration for the execution of another. *Harrison v. Magoon*, 418.

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- Ackerman v. Congdon, 7 H., 31: Ex parte Smith, 246.
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Ahmi v. Ashford, 12 H., 12: Mossman v. Dole, 369.
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Coffield v. Territory of Hawaii, 13 H., 478: Liverpool and London and Globe Ins. Co. v. Macfarlane, 484.

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CHARGE.

1. In criminal cases brought before a District Magistrate the charge against defendant is entered orally by the prosecuting officer upon the defendant's appearance and noted by the Magistrate in his record, and it is upon the charge as thus entered that the trial is had. *Territory of Hawaii v. Sing Kee*, 586.
2. Charge of libel held to sufficiently show connection of libellous matter with party claimed to be libeled. *Ter. of Hawaii v. Wong Shui King*, 615.

CHILDREN.

1. When a divorce decree has granted custody of children to the mother, a Probate Court in a guardianship proceeding has no jurisdiction to change the custody of the children. *Holloway v. Brown*, 170.
2. "Children" construed as a word of purchase, not of limitation. *Honolulu Investment Co. v. Rowland*, 271.
3. Children born out of wedlock, who become legitimate by statute upon the marriage of their parents, do not inherit land devised to children lawfully begotten." *Ibid.*
4. A guardian cannot make a lease to extend beyond a ward's minority so as to bind the ward, but such a lease is binding on the lessee until disaffirmed by the ward. *Nawahi v. Hakalan Pl. Co.*, 460.
5. A decree against a guardian in 1858 affecting property of his minor ward in a suit in which the guardian only was named as a party bound the minor. *Kapiolani Estate v. Atcherley*, 651.

CIRCUIT COURTS.

1. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge in Chambers. *Silva v. Souza*, 46.
2. Rule 15 c of Circuit Courts is directory, and a failure to notify opposite counsel of the filing of a Bill of Exceptions does not warrant dismissal of the exceptions in Supreme Court. *Territory of Hawaii v. Ah Moon*, 203.
3. Rule 15 c of Circuit Courts providing that in case of absence of a judge who presided at a trial, a bill of exceptions may be filed

CIRCUIT COURTS—Continued.

with the Clerk, applies to absence from city or protracted illness, not to absence in his chambers or temporary absence from the court house, and a bill of exceptions filed with clerk when judge is in his chambers may be stricken from record on motion. *Ii Estate v. Mele*, 311.

4. A Circuit Court has no right to make a rule allowing a continuance as a matter of course. *McBryde Estate v. Gay*, 313.

5. No appropriation was made by Act 10, Laws of 1901, for payment of bailiffs. *First Judge v. Auditor*, 393.

6. Territorial Courts, not Federal Court, have jurisdiction over suits by trustees in bankruptcy to recover preferences. *Thayer v. Lidgate*, 544.

CIRCUIT JUDGES AT CHAMBERS.

1. Trial Judge not disqualified from taking further evidence when decree is set aside and case is remanded by Supreme Court for that purpose. *In re Hitchcock*, 1.

2. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge at Chambers. *Silva v. Souza*, 46.

3. Territorial Courts, not U. S. District Court, have jurisdiction over suits by trustees in bankruptcy to recover preferences. *Thayer v. Lidgate*, 544.

COLLATERAL ATTACK.

1. A decree by a judge de facto cannot be attacked collaterally. *Hind v. Wilders' S. S. Co.*, 215.

2. An action of habeas corpus is a collateral attack. *Ex parte Smith*, 245.

3. An attack on a decree in a suit brought to enforce it is a collateral attack. *Kapiolani Estate v. Atcherley*, 651.

COMMISSIONERS OF FIRE CLAIMS.

1. The decisions of Commissioners of Fire Claims are not subject to review in mandamus. *Liverpool and London and Globe Ins. Co. v. Macfarlane*, 451.

2. The Legislature of the Territory of Hawaii has power to create a Commission of Fire Claims and provide that its decisions as to claims against the Territory for damages shall be final. *Ibid.*

COMMISSIONER OF PRIVATE WAYS AND WATER RIGHTS.

Query: Is a decision of Commissioner of Private Ways and Water Rights equivalent to decree? *H. C. & S. Co. v. Wailuku Sugar Co.*, 50.

COMMON LAW.

The common law consists of principles, not set rules. *Dole v. Gear*, 554.

COMMON NUISANCE.

A place behind a pile of lumber near a public highway in view of passers along the road is a "public place" as regards indecent exposure. *Territory of Hawaii v. Martin*, 304.

Indecent exposure in a public place is a common nuisance, though actually seen by only one person. *Ibid.*

COMPLAINT.

The function of a complaint in a criminal suit before a District Magistrate is to enable the Magistrate to determine whether there is sufficient probable cause to believe an offense has been committed to justify arrest of accused. It is not the charge upon which defendant is tried. *Territory of Hawaii v. Sing Kee*, 586.

CONSTITUTIONAL LAW.

1. A suit in equity for an accounting between a principal and an agent occupying a fiduciary relation, when accounts are long and complicated, does not violate right to jury trial under Constitution of 1894. *Kawananakoa v. Puahi*, 72.

2. The "faith and credit" clause of the U. S. Constitution does not make the commencement of an action in one jurisdiction a bar to a similar action in another jurisdiction. *Brown v. Equit. Life Ass. Soc. of U. S.*, 80.

3. The right to trial by jury is not infringed by trial before District Magistrates, as trial by jury is allowed on appeal to the Circuit Court. *Lewers & Cooke v. Redhouse*, 290.

4. The provision of Art. 39 of the Constitution of 1864 that "The King's private lands and other property are inviolable," did not prevent the statute of limitations from operating upon such lands. *Kapiolani Estate v. Cleghorn*, 330; *Kapiolani Estate v. Kaneohe Ranch Co.*, 643.

5. The Hawaiian stamp duty on deeds is not inconsistent with the constitutional provisions for uniformity, nor with any provision of the Organic Act. *Tomikawa v. Gama*, 431.

6. An issuance of an execution on a judgment of a District Magistrate in a case involving over \$20, pending an appeal to a Circuit Court, is practically a denial of the right to a jury trial and contrary to provisions of 7th amendment to U. S. Constitution. *Wong Chow v. Dickey*, 524.

CONSTRUCTION.

1. A tax law must be construed strictly, and not made to cover objects not clearly within the intention of the Legislature. *Valkenberg v. Treas. Territory of Hawaii*, 182.

2. The Court should not add to the language of a contract unless it is clear from the whole instrument that that is necessary to carry out the intention of the parties. *Hind v. Low*, 438.

CONSTRUCTION—Continued.

3. Any ambiguity in an instrument by which a grant of an exclusive right to a sea-fishery is claimed will be construed most strongly against the grantee. *Center v. Territory of Hawaii*, 465.
4. Argument of hardship, of contemporaneous and long continued construction, does not apply to a statute relating to publication of summons in divorce cases that is explicit and does not admit of construction. *Proper v. Proper*, 596.
5. An ambiguous decree may be read in the light of the remainder of the record. *Kapiolani Estate v. Atcherley*, 651.
6. See LAND, WILLS, TRUSTS.

CONTEMPT OF COURT.

1. On habeas corpus to test the validity of a judgment for contempt the Court may consider questions of jurisdiction only. *Ex parte Smith*, 245.
2. A court of equity may not enforce an order for temporary alimony by contempt proceedings pending an appeal. *Dole v. Gear*, 554.

CONTINUANCE.

1. A Circuit Court has no right to establish a practice allowing a continuance as a matter of course. *McBryde Estate v. Gay*, 313.
2. Every application for a continuance should stand on its own merit. *Ibid.*
3. An exception to an order granting a continuance will be overruled, though the order be erroneous, where the case is heard in the Supreme Court after the term at which the order was made is ended. *Ibid.*

CONTRACT.

1. Seduction subsequent to promise to marry does not make original contract to marry void as based on an immoral consideration. *Brown v. Bannister*, 34.
2. In a suit to recover money voluntarily paid on a contract, burden of proof is on plaintiff to show that defendant failed to perform his part of contract. *Levy v. Asbill*, 316.
3. A contract of sale must be accepted as a whole or repudiated in its entirety. *Montano v. Castle*, 362.
4. A cancellation of one agreement may be good consideration for the execution of another. *Harrison v. Magoon*, 418.
5. Notice to one person jointly liable on a contract for a breach, is sufficient notice to all. *Ibid.*
6. There need be no contract relation between a material man and the owner of the structure, to have a mechanics' lien attach. *Hackfeld v. Hilo R. R. Co.*, 448.
7. Recovery cannot be had against a part only of joint contractors. *Harrison v. Magoon*, 530.

CORPORATIONS.

1. Promoters who are also subscribers to stock do not cease to be promoters and become stockholders until articles of incorporation are filed with Treasurer of Territory. *Hitchcock v. Hustace*, 232.
2. Promoters are fiduciaries of the corporations they promote and their stockholders, and cannot make a valid agreement, acting for themselves and company at same time, giving themselves \$35,000 cash profit and 6,000 shares paid up stock without obtaining consent of others interested, and a failure to disclose the facts is a fraud that deprives them of right to compensation for their services. *Ibid*.
3. It is not necessary in a District Court for a corporation plaintiff to allege in its declaration that it is incorporated. *Hawaii Mill Co. v. Andrade*, 500.
4. That a corporation has a capacity to sue is presumed until brought in question by proper plea. *Ibid*.

CO-TENANTS.

1. One who has fee in a piece of land subject to a life estate in half the land may sue for a partition. *Baker v. Puni*, 179.
2. A decree in a partition suit should set out respective interests of the parties. *Lee Chu v. Noar*, 648.

COURTS.

1. Territorial Courts, not United States District Court, have jurisdiction over suits by trustees in bankruptcy to recover preferences. *Thayer v. Lidgate*, 544.
2. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge in Chambers. *Silva v. Souza*, 46.
3. A Tax Appeal Court has sole jurisdiction over a matter of over-assessment where Assessor has assessed to one person a whole tract previously owned by him, of which he had sold a portion without knowledge of the Assessor. *Booth v. Shaw*, 117.
4. There may be a de facto judge, even though the office is already filled by a de jure judge, if the latter is not in possession of the office. *Hind v. Wilder's S. S. Co.*, 215.
5. A decree by a judge de facto cannot be attacked collaterally. *Ibid*.
6. A District Magistrate has jurisdiction to try an action on a note for purchase price of land, though defendant claims no title passed by deed to him, if he has not been evicted or otherwise injured by the real owner. *Makainai v. Goo Wan Hoy*, 280.
7. A Circuit Court has no right to make a rule allowing a continuance as a matter of course. *McBryde Estate v. Gay*, 313.
8. No appropriation was made by Act 10, of Laws of 1901, for payment of bailiffs. *First Judge v. Auditor*, 393.

COURTS—Continued.

9. A decision of Commissioners of Fire Claims cannot be reviewed by any other court of the Territory of Hawaii. *Liverpool & London & Globe Ins. Co. v. Macfarlane*, 481.
10. The Territory has power to provide that decisions of Commissioners of Fire Claims on claims for damages against it shall be final. *Ibid.*

CRIMINAL LAW.

1. ADULTERY. An admission by one defendant that she is married is competent and sufficient evidence of marriage against herself, but not as against her co-defendant. *Ter. of Hawaii v. Castro*, 131.
2. ARREST. An arrest without warrant is legal when officers see offense of selling liquors without a license committed. *Ter. of Hawaii v. Sing Kee*, 586.
3. ASSAULT AND BATTERY. One entitled to possession of real property may not use force to recover possession. *Ter. of Hawaii v. Savidge*, 286.
4. Evidence held sufficient to justify jury in finding that party assaulted was officer in discharge of his duty and that defendant knew it. *Ter. of Hawaii v. Cheong Jim Cheong*, 610.
5. CHARGE. The charge against defendant is entered orally by prosecuting officer before District Magistrate upon the defendant's appearance, and noted by the Magistrate in his record, and it is upon the charge as thus entered that the trial is had. *Territory of Hawaii v. Sing Kee*, 586.
6. COMMON NUISANCE. A place behind a pile of lumber near a public highway, in view of passers along the road, is a "public place" as regards indecent exposure. *Ter. of Hawaii v. Martin*, 304.
7. Indecent exposure in a public place is a common nuisance, though actually seen by only one person. *Ibid.*
8. COMPLAINT. The function of a complaint is to enable the District Magistrate to determine whether there is sufficient probable cause to believe an offense has been committed to justify arrest of accused. It is not the charge upon which defendant is tried. *Territory of Hawaii v. Sing Kee*, 586.
9. INFORMERS. The testimony of informers is to be judged by same tests as that of other witnesses. *Territory of Hawaii v. Sing Kee*, 586.
10. LIBEL. Charge held sufficient. *Ter. of Hawaii v. Wong Shui King*, 615.
11. Evidence held to show publication of libel, and that language was used of and concerning complainant. *Ibid.*
12. SENTENCE. Where an error has been made in a sentence of imprisonment by omitting hard labor, the Supreme Court may remand the case to the trial court with directions to impose a new and legal sentence. *Territory of Hawaii v. Savidge*, 286.

DAMAGES.

1. Elements of damage in action of breach of promise. *Brown v. Bannister*, 34.
2. \$2,500 not excessive damages in action of breach of promise to marry. *Id.*
3. \$300 excessive damages for appropriating old fence and building new fence six feet high on plaintiff's land, giving bad appearance to land and cutting off view. *Silva v. Souza*, 46.
4. A defendant in an attachment suit who, by paying the debt sued on before return day, secures the discharge of the attachment, may not recover damages in a suit on a bond to pay damages in case the attachment should be dissolved by competent authority before final judgment. *Brown v. Haw. Supply Co.*, 463.
5. Date from which interest as damages for breach of contract should be computed. *Sun v. Makainai*, 495.
6. Where a runaway horse injures a wagon it is not necessarily contributory negligence to leave the wagon in street for five minutes without a horse attached. *Ikeda v. Hoe Lung*, 520.
7. A resolution of the Board of Health that a building is so unsanitary that it should be destroyed is not prima facie evidence that it is valueless, so that its owner is not damaged by its accidental burning. *Akwai v. Royal Ins. Co.*, 533.
8. A decree dismissing bill for specific performance, if question of damages is not raised, does not bar action for damages for breach of contract. *Paris v. Magoon*, 612.

DECREE.

1. A decree binds co-defendants adversary to each other, though there be no cross pleadings between themselves. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50.
2. In a suit to foreclose a mortgage in which the Government and Tax Assessor are not parties and taxes are not mentioned in pleadings, the Court should not decree that unpaid taxes are a prior lien. *Davies & Co. v. Wakefield*, 201.
3. A decree is binding as to necessary inferences from it. *Ibid.*
4. A decree dismissing bill for specific performance without raising question of damages does not bar suit for damages for breach of contract. *Paris v. Magoon*, 612.
5. Query: Does decision of Commissioner of Private Ways and Water Rights equal a decree? *H. C. & S. Co. v. Wailuku Sug. Co.*, 50.
6. A decree must follow the pleadings, and cannot go beyond the issues made by them, and so in a foreclosure suit cannot declare taxes a prior lien unless taxes are brought into the case by the pleadings. *T. H. Davies & Co., Ltd., v. Wakefield*, 201.
7. A decree of the Supreme Court in admiralty will not be set aside on ground that the decree appealed from was made by the successor

DECREE—Continued.

of the judge who tried the case and made decision. *Hind v. Wilder's S. S. Co.*, 215.

8. When a decree is made by a judge de facto in possession of an office de jure, performing the functions of that office with acquiescence of all concerned, a decree by the Supreme Court on appeal cannot be attacked on ground that the de facto judge had no jurisdiction. *Ibid.*

9. A decree of sale should contain a particular description of the property, but is not void for uncertainty if it refers to the property as described in plaintiff's petition, and this petition contains a definite description. *Lee Chu v. Noar*, 648.

10. A decree that R. A., guardian, convey certain land held to order conveyance of the interests of the wards in the land to be conveyed. *Kapiolani Estate v. Atcherley*, 651.

11. Decrees rendered during a period extending from 45 years ago to 15 years ago, settling titles to real estate and made in conformity with a procedure then regarded as good and impliedly decided to give jurisdiction to the courts and bind minor wards, should be now upheld, irrespective of any later change of procedure, and though the Supreme Court today thinks differently as to the correctness of the former practice. *Ibid.*

12. An attack on a decree in a suit brought to enforce it is a collateral attack. *Ibid.*

DEED.

1. A conveyance in fee reserving to the grantor the right to jointly use and occupy said property during her natural life, together with the grantee, "does not leave the grantor a life estate in more than one-half the land nor create a personal relation with the grantee that will prevent her alienating her interest. *Baker v. Puni*, 179.

2. Record of a deed is competent evidence, though the original is in court, and the record tends to impeach the validity of the original. *Hong Quon v. Chea Sam*, 276.

3. Parol testimony is inadmissible to vary terms of a deed by showing the length of one side of parcel of land longer in the survey notes than in the deed. *Brown v. Spreckels*, 399.

4. The words, "with the right of extension to low water mark," in a deed of land convey land owned by grantor between the land specifically described and the ocean. *Ibid.*

5. The word "beach" may be used in a deed in a popular sense denoting not only the space between high and low water mark, but part of the adjoining land. *Ibid.*

6. A good and sufficient deed is one properly stamped. *Tomikawa v. Gama*, 431.

7. Where will gives life tenant power to sell in fee when circumstances make it necessary or advisable, the deed need not set out

DEED—Continued

any facts to show necessity or advisability of the sale. *Walker v. Bickerton*, 492.

8. Parol testimony not admissible to vary terms of deed as to right of way. If a mistake in deed, suit should be brought in equity to reform it. *Quadros v. Frear*, 549.

DEFAULT.

1. Where a District Magistrate sends up certificate of appeal and record three years after the appeal is perfected and judgment by default is rendered against defendant, who has had no notice that appeal is sent up or of hearing until execution is issued, it is an abuse of discretion to refuse to vacate the judgment on motion. *Vivas v. Akoni*, 115.

2. Person failing to make a tax return is without remedy when assessed for an entire tract of land previously owned by him of which he has sold part. *Shaw v. Booth*, 117.

3. Discretion of trial judge held not abused in granting motion to set aside a default. *Tibbets v. Pali*, 517.

4. District Magistrates should not declare defendant in default for lack of written pleadings. *Paris v. Vasconcellos*, 590.

5. A tax-payer who makes tax return is entitled to an appeal, though the return be faulty. *In re taxes, May & Co.*, 639.

DEFINITIONS.

1. Beach. *Brown v. Spreckels*, 399.

2. Property. *Carter v. Territory of Hawaii*, 465.

DESCENT.

In absence of a will, children declared legitimate by statute inherit equally with those born legitimate, but a testator may by will exclude those begotten unlawfully. *Honolulu Investment Co. v. Rowland*, 271.

DISTRICT MAGISTRATES:

1. Where a District Magistrate sends up certificate of appeal and record three years after the appeal is perfected and judgment by default is rendered against defendant, who has had no notice that appeal is sent up or of hearing until execution is issued, it is an abuse of discretion to refuse to vacate the judgment on motion. *Vivas v. Akoni*, 115.

2. A District Magistrate has jurisdiction to try an action on a note for purchase price of land, though defendant claims no title passed by deed to him, if defendant has not been evicted or otherwise injured by the real owner. *Makainai v. Goo Wan Hoy*, 280.

3. A certificate of a District Magistrate that an appeal was duly noted upon a certain point of law is sufficient to raise that point of

DISTRICT MAGISTRATES—Continued.

law before the Supreme Court, though it does not appear otherwise that the point of law was raised before the Magistrate. *Lewers & Cooke v. Redhouse*, 290; *Ming Hym v. Young Fong*, 300.

4. Constitutional right to jury trial is not denied to parties before District Magistrates, as a jury trial is obtainable by appeal. *Lewers & Cooke v. Redhouse*, 290.

5. Amount involved as determining jurisdiction of District Magistrate. *Ibid*; *Phillips v. Lun Chong*, 295.

A District Magistrate may not issue execution in a case involving over \$20, pending an appeal to Circuit Court. *Wong Chow v. Dickey*, 524.

6. It is not necessary in a District Court for a corporation plaintiff to allege in its declaration that it is incorporated. *Hawaii Mill Co. v. Andrade*, 500.

7. District Magistrates should not declare defendant in default for lack of written pleadings. *Paris v. Vasconcellos*, 590.

DIVORCE.

1. Finding of the Court in a divorce case is entitled to same weight as verdict of a jury. *Rickard v. Rickard*, 68.

2. Evidence in divorce case held not to necessarily prove adultery. *Ibid*.

3. Alimony may be awarded in gross, *Nobrega v. Nobrega*, 152.

4. It is not necessary to use tables of mortality and annuities in determining amount of alimony in gross. *Ibid*.

5. An excessive amount of alimony payable within too short a time may be set aside by appellate court. *Ibid*.

6. As a rule allowances of alimony in gross are less than one-third the estate and the property the wife already has is taken into account. *Ibid*.

7. When in a divorce decree custody of children is given to the mother, a probate court in a guardianship proceeding has no jurisdiction to change the custody of the children. *Holloway v. Brown*, 170.

8. When libelee cannot be found, publication of summons may be made in newspapers declared by the Supreme Court to be newspapers of general circulation. *Winslow v. Winslow*, 498.

9. Appeals do not lie in divorce suits. *Nobrega v. Nobrega*, 502.

10. The statutory provision for alimony in connection with divorce and separation does not prevent equity from having jurisdiction over a suit for maintenance. *Dole v. Gear*, 554.

11. Publication of summons in neither Government Gazette, Ke Au Okoa, nor any newspaper declared by Supreme Court to be of general circulation is insufficient. *Proper v. Proper*, 596.

DOWER.

An expression in a will that a devise of land to a wife is to be her dower without any personal property does not show an intention that the devise was for life only. *Keanu v. Koahi*, 142.

EJECTMENT.

1. ADVERSE POSSESSION. *Albertina v. Kapiolani Estate*, 321. *Kapiolani Estate v. Cleghorn*, 330. *Kapiolani Estate v. Kaneohe Ranch Co.*, 643. *Smith v. Hamakua Mill Co.*, 669.
2. CONSTRUCTION OF DEED. *Brown v. Spreckels*, 399.
3. It is proper for a trustee to bring an action of ejectment in his own name without describing himself as trustee. *Hawn. Trust and Investment Co. v. Barton*, 641.

ELECTIONS.

1. The Secretary of the Territory cannot lawfully decline to place upon the official ballot the name of a candidate properly nominated though the candidate be disqualified. *Harris v. Cooper*, 145.
2. The fact that each house of the Legislature is by the Organic Act judge of the elections, returns and qualifications of its members, makes the jurisdiction of each house exclusive in such cases, as against the Secretary or the Courts. *Harris v. Cooper*, 145.
3. Inspectors of election are officers within meaning of statute that no person holding more than one office shall draw more than the salary of the highest office if that amount to \$1200 a year, but clerks of election are not. *Appeal of Cooper*, 282.

EQUITY.

1. A principal may maintain a bill in equity for an accounting against an agent occupying a fiduciary relation. *Kawananakoa et al. v. Peahi*, 72.
2. A court of equity in a suit for accounting between principal and agent may determine questions of lawfulness of discharge and compensation. *Ibid.*
3. A suit may be brought in equity to enjoin an action at law and compel a conveyance of the legal title, though an equitable estoppel may be had, and an equitable title proved, in an action at law. The law remedy is not full and complete. *Kidwell v. Godfrey*, 138.
4. An injunction will not be used to take property out of the possession of one party and put it into that of another. *Wundenberg v. Markham*, 167.
5. A trespass consisting of ouster of plaintiff from land, causing forfeiture of lease to plaintiff, does not constitute a case of irreparable injury that will give equity grounds to enjoin the trespass, when a suit to determine the title is already pending and undecided. *Ibid.*
6. Mere insolvency of defendant in suit to enjoin a trespass when injury is not irreparable, the main issue being the title, will not warrant interference of a court of equity by injunction. *Ibid.*

EQUITY—Continued.

7. Irregularity of proceedings before a master because of his failure to take an oath may be waived by stipulation. *Tomikawa v. Gama*, 175.
8. A lease by inexperienced young man with little business ability to a capable business man for an inadequate consideration, the weaker trusting the former to protect his interest, will be cancelled by a court of equity. *Hall v. Winam*, 306.
9. A condition in a trust deed securing bonds of a corporation that upon default, in payment of interest, the principal shall, upon the option of a majority of the bondholders, become immediately due, does not take away from a minority stockholder his right in equity to compel a foreclosure to collect payment of interest due on bonds held by him. *Guardianship of Parker*, 347.
10. Equity has no jurisdiction of an action brought solely to obtain writ of possession in favor of purchaser at a foreclosure of mortgage made without suit under a power of sale. *Carter v. Kaikainahaole*, 515.
11. That there is a large accumulation of untried law cases does not render a remedy of law inadequate, and thus give equity jurisdiction of a case. *Ibid.*
12. A trustee in bankruptcy wishing to recover preference, where no accounting necessary, has an adequate remedy at law in an action of assumpsit. *Thayer v. Lidgate*, 544.
13. Equity has jurisdiction independently of proceedings for divorce or separation to grant permanent maintenance. *Dole v. Gear*, 554.
14. An order in equity for temporary maintenance is appealable, and cannot be enforced by contempt proceedings pending an appeal. *Ibid.*
15. Receiver held to be improperly appointed in a partition suit, the bill containing no specific prayer for a receiver, the evidence showing no exclusion of complainants by respondent from the property and no mismanagement. *Lee Chu v. Noar*, 648.
16. An appeal from a final decree in an equity case brings up for review interlocutory orders and matters within discretion of the trial judge. *Ibid.*
17. A court of equity properly refuses leave to sue a receiver when applicant does not state what nature of action he desires to bring nor in what court he desires to sue. *McChesney v. Kona Sugar Co.*, 680.

ESTATES TAIL.

Will construed not to create an estate tail. *Honolulu Investment Co. v. Rowland*, 271.

ESTOPPEL.

1. An insurance company is estopped from avoiding a policy for facts which existed to its knowledge at time of issuance of policy. *Look See v. Royal Ins. Co.*, 5.

ESTOPPEL—Continued.

2. A suit may be brought in equity to enjoin an action at law and compel a conveyance of the legal title, though an equitable estoppel may be had and an equitable title proved in an action at law, for the law remedy is not full and complete. *Kidwell v. Godfrey*, 138.

3. Testimony by a complainant that amount due by him is \$1,290, with an offer to pay that sum, does not estop him from claiming benefit of master's finding that amount due is only \$833.35. *Tomikawa v. Gama*, 175.

4. Parties stipulating after the expiration of time for presenting exceptions for an extension of time are not estopped to claim that an allowance of such exceptions is invalid. *Kapiolani Estate v. Peck & Co.*, 580.

See RES ADJUDICATA.

EVIDENCE.

1. Held to prove that burning of one building would endanger another insured in same policy. *Choy Look See v. Royal Ins. Co.*, 11.

2. Evidence that seduction was accomplished by virtue of a promise of marriage held sufficient to support verdict. *Brown v. Bannister*, 34.

3. What is proof of damage in action of breach of promise. *Brown v. Bannister*, 34.

4. Evidence tending to show that will was procured by undue influence held to be sufficient to support verdict for contestants. *In re Will of Naoiwi*, 43.

5. Evidence held not to necessarily prove adultery. *Rickard v. Rickard*, 68.

6. A letter need not be produced as the best evidence, when the question is, not what was in the letter, but what was said by one who read or purported to read in part from the letter. *Brown v. Equit. Life Ass. Soc. of U. S.*, 80.

7. An admission by a woman of marriage is competent evidence of marriage in a criminal action of adultery against herself, but not against her co-defendant. *T. of H. v. Castro*, 131.

8. Evidence held to support judgment of trial court in suit for breach of warranty in sale of a horse. *Lillis v. Carty*, 132.

9. Trust deed made by party just released from guardianship as spendthrift held to prove need of guardianship. *In re Estate of Kapukini*, 204.

10. Evidence held not to show that creditor had reasonable cause to believe debtor insolvent. *Fairer v. H. Hackfeld & Co., Ltd.*, 209.

11. Record of a deed is competent evidence, though the original is in court, and the record would tend to impeach the validity of the original. *Hong Quon et al. v. Chea Sam et al.*, 276.

12. Evidence held to prove adverse possession of fish-pond and banks. *Albertina v. Kapiolani Estate*, 321.

EVIDENCE—Continued.

13. Parol evidence is inadmissible to vary terms of a deed by showing the length of one side of parcel of land longer in the survey notes than in the deed. *Brown v. Spreckels*, 399.
14. Evidence is inadmissible to show ordinary meaning of common words, such as beach. *Ibid.*
15. Evidence held not to prove reformation of spendthrift. *In re Guardianship of Humeku*, 413.
16. A resolution of a Board of Health that all buildings in a block are so unsanitary as to require destruction by fire is not prima facie evidence that a building in such block is valueless. *Akwai v. Royal Ins. Co.*, 533.
17. Parol evidence not admissible to vary terms of a deed as to right of way. If a mistake in the deed proceedings should have first been had in equity to reform it. *Quadros v. Frear*, 549.
18. Where declaration alleges a private road by deed, evidence is not admissible to prove a public road by dedication. *Ibid.*
19. That a search of a building is unauthorized does not render evidence thus found inadmissible. *Territory of Hawaii v. Sing Kee*, 586.
20. The testimony of informers is to be judged by same tests as that of other witnesses. *Ibid.*
21. Congress can prescribe rules of evidence for courts of Territories, and promissory notes not stamped in accordance with provisions of War Revenue Tax law of 1898 are not competent evidence here. *Makainai v. Goo Wan Hoy*, 607.
22. Evidence held sufficient to justify jury in finding that party assaulted was officer in discharge of his duty and defendant knew it. *Territory of Hawaii v. Cheong Jim Cheong*, 610.
23. Evidence held sufficient to prove publication of libel and that libellous words were used of and concerning complainant. *Territory of Hawaii v. Wong Shui King*, 615.
24. In replevin suit for heifer a District Magistrate may permit the production of the animal at some convenient place and personally examine the ear-mark. *Greenwell v. Gouveia*, 636.
25. Evidence in partition suit held to show property incapable of being divided in kind without great prejudice to parties. *Lee Chu v. Noar*, 648.
26. A mere scintilla of evidence is insufficient to support a verdict. *Smith v. Hamakua Mill Co.*, 669.
27. Notes not stamped in accordance with Federal Stamp Act are not made competent evidence by the repeal of that portion of the Revenue Act requiring stamps on notes. *Makainai v. Goo Wan Hoy*, 683.
28. Appeal will not be dismissed for want of transcript of evidence when evidence is not necessary to enable the court to dispose of the appeal on its merits. *In re Estate of Holt*, 164.

EVIDENCE—Continued.

29. Where no transcript of testimony is in the record the Supreme Court will not consider whether a Circuit Judge has abused his discretion in ordering an execution to issue pending an appeal. *Orpheum Co. v. Dimond & Co.*, 522.

EXCEPTIONS.

1. A decision overruling a plea of former conviction is interlocutory, and cannot be taken by exceptions to the Supreme Court before final disposition of the case except by permission of Circuit Judge. *Territory of Hawaii v. Ah Quong*, 108.
2. Bill of exceptions not necessary where exceptions have been reduced to writing in a summary mode and signed and allowed by judge. *Ibid.*
3. The Supreme Court may allow an exception upon the refusal of the trial judge to do so before final disposition of the case, it being shown to be conformable to the truth. *Ibid.*
4. Circuit Court Rule 15 c is directory, and a failure to notify opposite counsel of the filing of a Bill of Exceptions does not warrant dismissal of the exceptions in Supreme Court. *Territory of Hawaii v. Ah Moon*, 203.
5. A transcript of evidence among the papers, but not filed in the Circuit Court nor made part of the Bill of Exceptions by reference, will not be considered by the Supreme Court. *Ibid.*
6. Allowance of a Bill of Exceptions from an interlocutory decision or judgment shows that judge, in his discretion, thinks the same advisable for a speedy termination of the case. *Ahmi v. Cornwell*, 301.
7. Rule 15 c of Circuit Courts, providing that in case of absence of a judge who presided at a trial, a Bill of Exceptions may be filed with the Clerk, applies to absence from city or protracted illness, not to absence in his chambers or temporary absence from the court house, and a Bill of Exceptions filed with Clerk when judge is in his chambers may be stricken from record on motion. *John Li Estate, Ltd., v. Mele*, 311.
8. An exception to an order allowing a continuance will be overruled by the Supreme Court, if heard so late that it would be fruitless to sustain the exception, even though the order be erroneous. *McBryde Estate v. Gay*, 313.
9. A presiding judge cannot, after time for presenting written exceptions has expired, make an order allowing additional time, even though parties give consent by stipulation. *Kapiolani Estate v. Peck & Co.*, 580.

EXECUTION.

1. On writ of error, if there be no transcript of testimony in record, Supreme Court will not consider whether Circuit Court abused its discretion in ordering execution to issue pending an appeal. *Orpheum Co. v. Dimond & Co.*, 522.

EXECUTION—Continued.

2. A District Magistrate has no authority to issue execution pending appeal in cases wherein a jury trial is demandable as of right. *Wong Show v. Dickey*, 524.

EXECUTORS AND ADMINISTRATORS.

1. Physicians' fees for attendance in last illness of a decedent are not entitled to priority of payment over ordinary debts. *Grace v. Smith*, 144.
2. Failure to prove a mortgage debt within six months from advertised notice to claimants will not bar the mortgage. *Kaikainahaole v. Allen*, 527.
3. An administrator may not come into equity for advice as to questions of law that can be readily answered by an attorney. *Ibid.*

FEES.

1. Auctioneer's fee should not exceed \$450 for selling six parcels of land on partition suit for \$29,205, and selling one lot twice for \$3,000 besides. *Schlieff v. Clark*, 78.
2. \$250 too high for attorney-in-law, guardian of a spendthrift, for defending suit to terminate the trust; \$100 proper. *In re Estate of Kapukini*, 204.
3. Fees allowed attorneys in equity suit against promoters to recover promoters' fees voted themselves reduced from \$20,000 to \$7,500. *Hitchcock v. Hustace*, 232.
4. Attorneys' commissions not to be included in determining whether a District Magistrate has jurisdiction. *Lewers & Cooke v. Redhouse*, 290.
5. A guardian grossly negligent in performance of duties is not entitled to commissions. *In re Guardianship of Hoare*, 443.
6. A Circuit Court on appeal from a District Magistrate in action of assumpsit cannot award attorney's commissions on amount recovered before the District Magistrate, as well as attorney's commissions on amount recovered in Circuit Court. *Sun v. Makainai*, 495.
7. An appeal may be taken by a party in person or by a new attorney without a substitution of attorneys of record from an order in respect to counsel fees in which her interests and her attorney's are adverse. *Nobrega v. Nobrega*, 502.
8. A court of equity should not allow defendant an attorney's fee on dissolution of a temporary injunction without proof of payment of such fee by defendant. *Kaikainahaole v. Allen*, 527.

FIDUCIARY RELATIONS.

1. A principal may maintain a bill in equity for an accounting against an agent occupying a fiduciary relation. *Kawamauka v. Puahi*, 72.

FIDUCIARY RELATIONS—Continued.

2. Promoters are fiduciaries of the corporations they promote and their stockholders, and cannot make a valid agreement acting for themselves and company at same time, giving themselves \$35,000 cash profit and 6,000 shares paid up stock, without obtaining consent of others interested, and a failure to disclose the facts is a fraud that deprives them of right to compensation for their services. *Hitchcock v. Hustace*, 232.
3. A lease by inexperienced young man with little business ability to a capable business man for an inadequate consideration, the weaker trusting the former to protect his interest, will be cancelled by a court of equity. *Hall v. Winam*, 306.
4. A purchase of bonds by a guardian from a corporation of which he is a director and treasurer is voidable at the election of the guardian ad litem of the ward. *In re Guardianship of Parker*, 347.

FISHERIES.

1. Kamehameha III. had power to grant exclusive fishing rights. *Carter v. T. of H.*, 465.
2. No exclusive rights to sea fisheries in the Hawaiian Islands based on ancient custom or prescription. *Ibid.*
3. The ancient Hawaiian statutes that gave landowners fishing rights in adjacent waters were not in the nature of grants, and gave no vested rights. *Ibid.*
4. The grant of an exclusive right to a sea fishery will not be presumed. *Ibid.*

FORFEITURE.

1. A forfeiture of rights under a contract of sale of land on instalments by failure to pay instalments on time, as agreed, is waived by seller by acceptance of instalments on account after the time specified for their payment had passed. *Tomikawa v. Gami*, 175.
2. A trespass consisting of ouster of plaintiff from land, causing forfeiture of lease to plaintiff, does not constitute a case of irreparable injury that will give equity grounds to enjoin the trespass, when a suit to determine the title is already pending and undecided. *Wunderberg v. Markham*, 167.
3. Permitting land to become overgrown with lantana held not to be a breach of covenant not to suffer any waste or any improper use of premises. *Paris v. Vasconcellos*, 590.

FRAUD.

1. A failure by promoters to disclose to subscribers to stock the facts that they were to receive \$35,000 profit and 6,000 shares paid up stock for their services is a fraud. *Hitchcock v. Hustace*, 232.
2. Constructive fraud. *Hall v. Winans*, 306; *In re Guardianship of Parker*, 347.

GARNISHMENT.

1. A debt owing by third party to a defendant which accrues after service of process upon the garnishee, can not be held. *Phillips v. Lun Chong Co.*, 295.
2. A debt owing to a partnership may not be garnished in an action against one of the partners. *Ming Hym v. Young Tong*, 300.
3. Service of garnishee by delivery of copy of summons that does not have a signature of the Clerk of the Court is defective. Such defect cannot be cured by amendment or the voluntary appearance of the garnishee. *Hayashi v. Iwata*, 627.

GUARANTOR.

1. A trustee in bankruptcy cannot recover from a creditor of the bankrupt a payment made by a guarantor of a debt of the bankrupt. *Fairer v. H. Hackfeld & Co., Ltd.*, 209.
2. Under partnership articles prohibiting any partner from creating any liability on behalf of the company, one partner cannot bind the other partners by a contract to guarantee to the extent of £2,000 satisfaction with the business to a person entering into the business with them. *Harrison v. Magoon*, 418.

GUARDIAN AND WARD.

1. When a divorce decree has granted custody of children to the mother, a Probate Court in a guardianship proceeding has no jurisdiction to change the custody of the children. *Holloway v. Brown*, 170.
2. \$250 held to be too large a fee for an attorney-in-law, guardian of a spendthrift, to receive from the estate for defending action to terminate the guardianship; \$100 proper fee. *In re Kapukini*, 204.
3. Guardians are not limited in the investment of trust funds to public securities or real estate mortgages, but may make other investments, exercising a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. *In re Guardianship of Parker*, 347.
4. A condition in a trust deed securing bonds requiring assent of a majority of bondholders to compel the trustees to foreclose for default on payment of interest, does not make buying of a bond by a guardian a delegation of authority, and improper. *Ibid.*
5. A purchase of bonds by a guardian from a corporation of which he is a director and treasurer is voidable at the election of the guardian ad litem of the ward. *Ibid.*
6. The burden of proving that there is no reason for the continuance of guardianship of a spendthrift is on the ward. *In re Guardianship of Humcku*, 413.
7. A guardian who mixes trust funds with his own and keeps no satisfactory separate account should be charged interest upon money allowed to lie idle an unreasonable time. *In re Guardianship of Hoare*, 413.

GUARDIAN AND WARD—Continued.

8. A guardian is chargeable with rents he would have obtained had he faithfully discharged his duties. *Ibid.*
9. Where a guardian pays irregularly for support of his ward as necessity requires, should not be allowed a lump sum for further payments calculated at a definite sum per month for several years by pure conjecture. *Ibid.*
10. A guardian grossly negligent in performance of duties is not entitled to commissions. *Ibid.*
11. A guardian cannot make a lease to extend beyond a ward's minority so as to bind the ward, but such a lease is binding on the lessee until disaffirmed by the ward. *Nawahi v. Hakalau Pl. Co.*, 460.
12. A decree against a guardian made in 1858 affecting property of his minor ward in a suit in which the guardian only was named as a party, and never enforced against such guardian, is binding on one claiming under such minor, in a suit brought to enforce the decree against her. *Kapiolani Estate v. Atcherley*, 651.

HABEAS CORPUS.

On habeas corpus to test the validity of a judgment for contempt of court, questions of jurisdiction only may be considered. *Ex parte Smith*, 245.

HUSBAND AND WIFE.

1. Evidence held not necessarily to prove adultery. *Rickard v. Rickard*, 68.
2. Alimony in gross. *Nobriga v. Nobriga*, 152.
3. Appeals do not lie in divorce cases. *Ibid.*
4. When in a divorce decree custody of children is given to the mother, a Probate Court in a guardianship proceeding has no jurisdiction to change the custody of the children. *Holloway v. Brown*, 170.
5. A court of equity may grant maintenance to a wife and also temporary maintenance. *Dole v. Gear*, 554.
6. An order for temporary maintenance by a court of equity is appealable, and cannot be enforced by contempt proceedings pending an appeal. *Ibid.*
7. Publication in divorce suits. *Winslow v. Winslow*, 498; *Proper v. Proper*, 396.
8. An expression in a will that a devise of land to a wife is to be her dower, without any personal property, does not show an intention that the devise is for life only. *Kcanu v. Kaohi*, 142.

INDECENT EXPOSURE.

Indecent exposure, though to only one person, if in a public place where it might be seen by others, constitutes the offense of common nuisance. *Ter. of Hawaii v. Martin*, 304.

INFANTS, see MINORS.

INJUNCTION.

1. A suit may be brought in equity to enjoin an action at law and compel a conveyance of the legal title, though an equitable estoppel may be had and an equitable title proved in an action at law, for the law remedy is not full and complete. *Kidwell v. Godfrey*, 138.
2. An injunction will not be used to take property out of the possession of one party and put it into that of another. *Wundenberg v. Markham*, 167.
3. Mere insolvency of defendant in suit to enjoin a trespass when injury is not irreparable, the main issue being the title, will not warrant interference of a court of equity by injunction. *Ibid.*

INSTRUCTIONS.

1. An erroneous instruction cannot be taken advantage of in Appellate Court, when no exception has been noted to the instruction as given. *Brown v. Bannister*, 37.
2. It is not error to refuse to instruct that a certain article of a constitution was in force at a certain period, where there is no request to tell the jury the substance of the article. *Kapiolani Estate v. Cleghorn*, 330.
3. Instructions need not be given as requested if given substantially in other forms. *Ibid.*
4. Improper instructions are not subject to review on appeal where no objection is made to them before the verdict is rendered. *Hitchcock v. Haww. Tramways Co.*, 137.

INSURANCE.

1. Under a provision in a fire insurance policy that the entire policy shall be void if a building therein described be or become vacant or unoccupied, and so remain for ten days, the contract is entire, and an entire policy covering two buildings becomes void if one building remain unoccupied for ten days, though this contribute nothing to the loss. *Choy Look See v. Royal Ins. Co.*, 5.
2. Knowledge by an insurance company at time of issuance of policy of facts which make policy void under its terms, estops insurance company from relying on such facts to award the policy. *Choy Look See v. Royal Ins. Co.*, 6.
3. Where a policy provides that proofs of loss be made within sixty days after the fire, and that no suit on the policy shall be sustainable in any court "until after full compliance by the insured with all the foregoing requirements," a failure to file such proofs for sixty days after the fire bars any collection of any claim for loss. *Boardman v. Fireman's Fund Ins. Co.*, 21.
4. Where a policy provides that no agent of the insurance company except an officer of the company shall have power to waive any

INSURANCE—Continued.

provision or condition of the policy, unless such waiver be written upon or attached to the policy, there may be no proof of an oral waiver by an agent of a provision of the policy. *Boardman v. Fireman's Fund Ins. Co.*, 21.

5. Evidence held to prove that burning of one building would endanger the other insured in same policy. *Choy Look See v. Royal Ins. Co.*, 11.

6. A demand not necessary before suit on policy of life insurance in which the company agrees to pay on receipt of satisfactory proofs of death, and nothing is stated as to demand. *Brown v. Equit. Life Ass. Soc. of U. S.*, 80.

7. An action in life insurance policy is transitory, and need not be brought at place where policy is payable. *Ibid.*

8. A refusal to pay amount of insurance policy on other grounds waives a requirement of a demand. *Ibid.*

9. Pendency of a subsequent action on life insurance policy elsewhere is no ground for an abatement of the prior action here. *Ibid.*

10. A resolution of the Board of Health that a building is so unsanitary that it should be destroyed is not prima facie evidence that it is valueless, so that its owner is not damaged by its accidental burning. *Akwai v. Royal Insurance Co.*, 533.

INTEREST.

1. Interest when prayed for should be included in determining whether the amount sued for is within jurisdiction of a District Magistrate. *Lewers & Cooke v. Redhouse*, 290.

2. Interest as damages for breach of contract should be computed from the date of the breach, and in suit for labor performed and goods furnished for which four bills had been rendered, is properly allowed from the date of rendering of each bill. *Sun v. Makainai*, 495.

3. A guardian who mixes trust funds with his own and keeps no satisfactory separate account should be charged interest upon money allowed to lie idle an unreasonable time. *In re Guardianship of Hoare*, 443.

JUDGE.

1. When the Supreme Court sets aside a decree in equity and remands the cause with an order that evidence be received on an issue raised by amended pleadings after the close of the original hearing, which had been rejected by the trial judge, the trial judge is not disqualified from taking such evidence and rendering a decree by the statutory provision that "No judge shall sit on a new trial in any case in which he may have given a previous judgment." *In re Hitchcock et al.*, 1.

JUDGE—Continued.

2. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge at Chambers. *Silva v. Souza*, 46.
3. There may be a de facto judge, even though the office is already filled by a de jure judge, if the latter is not in possession of his office. *Hind v. Wilder's S. S. Co.*, 215.
4. A decree by a judge de facto cannot be attacked collaterally. *Ibid.*
5. Improper acts of a judge in keeping jury out after they had reported that they could not agree are not subject to review on appeal where no objection to such acts was made before the verdict was rendered. *Hitchcock v. Haw. Tramways Co.*, 137.

JUDICIAL SALE.

1. 'When land is sold in a partition suit, rent accruing between dates of sale and confirmation belong to the partitioners, not to the purchasers. *Schlieff v. Clark*, 326.
2. A decree of sale should contain a particular description of the property, but is not void for uncertainty if it refers to the property as described in plaintiff's petition, and this petition contains a definite description. *Lee Chu v. Noar*, 648.

JURISDICTION.

1. A Circuit Court has no jurisdiction over a case appealed from a District Magistrate to a Circuit Judge in Chambers. *Silva v. Souza*, 46.
2. Consent of parties cannot give a judge in probate jurisdiction to modify a divorce decree as to custody of children. *Holloway v. Brown*, 170.
3. The statutory provision that District Magistrates have no jurisdiction to try suits in which the title to real estate is involved does not apply to suit on a promissory note for purchase price of land where defendant claims that the vendor had no title to land, but defendant has not been evicted or otherwise injured by the real owner. *Makainai v. Goo Wan Hoy*, 280.
4. A District Magistrate has jurisdiction to try without a jury cases involving over \$20, notwithstanding constitutional right to a jury trial. *Lewers & Cooke v. Redhouse*, 290.
5. The amount prayed for, and not the amount due, determines whether a case is within a District Magistrate's jurisdiction. *Lewers & Cooke v. Redhouse*, 290.
6. Where a book account exceeds \$300, and plaintiff brings suit on a part only, before a District Magistrate, the Magistrate will have jurisdiction, the balance being deemed waived. *Ibid*; *Phillips v. Lun Chong Co.*, 295.

JURISDICTION—Continued.

7. In determining whether action is within jurisdiction of a District Magistrate, attorneys' commissions and costs should not be included, but interest, if prayed for, should be included. *Ibid.*
8. Where case is beyond jurisdiction of a District Magistrate because of prayer for interest, jurisdiction cannot be given after judgment by a waiver of amount in excess. *Ibid.*
9. Consent will not give judge jurisdiction to allow bill of exceptions after expiration of statutory time. *Kapiolani Estate v. Peck & Co.*, 580.
10. In 1858 courts acquired jurisdiction over minors without making them parties by name, where their guardians were made parties. *Kapiolani Estate v. Atcherley*, 651.
11. The Territorial Courts have jurisdiction of suits by a trustee in bankruptcy to recover a preference. *Thayer v. Lidgate*, 545.
12. Service by delivery of copy of summons that does not have seal or signature of the Clerk gives the court no jurisdiction. *Hayashi v. Iwata*, 627.
13. A garnishee cannot give court jurisdiction by entering its appearance. *Ibid.*
14. A general appearance is a waiver of any defect in a published notice to appear. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50.

JUDGMENTS.

1. A judgment non obstante veredicto may be ordered for the defendant, as well as for the plaintiff, and on the evidence as well as on the pleadings when the facts are undisputed. *Choy Look See v. Royal Ins. Co.*, 14; *Boardman v. Fireman's Fund Ins. Co.*, 21.
2. Where a District Magistrate sends up certificate of appeal and record three years after the appeal is perfected and judgment by default is rendered against defendant, who has had no notice that appeal has been sent up or of hearing till execution is issued, it is an abuse of discretion to refuse to vacate the judgment on motion. *Vivas v. Akoni*, 115.
3. An action of habeas corpus is a collateral attack. *Ex parte Smith*, 245.

JURY.

1. Constitutional right to a trial by jury under Constitution of 1894 is not violated by a suit in equity for an accounting between principal and agent. *Kawananakoa v. Puahi*, 72.
2. Any improper treatment of jury by judge must be objected to before verdict is rendered and exceptions noted, or the action of the judge will not be subject to review or appeal. *Hitchcock v. Haw. Tramways Co.*, 137.
3. A District Magistrate has jurisdiction to try cases involving over \$20 without a jury. *Lewers & Cooke v. Redhouse*, 290.

JURY—Continued.

4. Whether defendant in suit for malicious prosecution acted on advice of counsel in good faith without malice is peculiarly a matter for the jury. *Ahmi v. Cornwell*, 301.
5. Whether a written contract, made by partner for all, is authorized by a power of attorney or by articles of copartnership, is a question of law for the judge, and should not be submitted to the jury. *Harrison v. Magoon*, 418.
6. In a case in which a right to a jury trial is protected by the U. S. Constitution, a District Magistrate may not issue an execution pending an appeal to a jury. *Wong Chow v. Dickey*, 524.

KULEANA.

The phrase in old grants "reserving, however, the people's kuleana therein," means house lots and taro patches, and has no reference to such public rights as land between high and low water mark for bathing purposes. *Territory of Hawaii v. Liliuokalani*, 88.

See *Kapiolani Estate v. Kaneohe Ranch Co.*, 645-6.

LAND.

1. A conveyance in fee reserving to the grantor the right to "jointly use and occupy said property during her natural life, together with the grantee," does not leave the grantor a life estate in more than one-half the land, nor create a personal relation with the grantee that will prevent her alienating her interest. *Baker v. Puni*, 179.
2. Lack of title is no defense to an action for the purchase price of land if the defendant has possession and has not been ousted by the owner or compelled to pay off an encumbrance. *Makainai v. Goo Wan Hoy*, 280.
3. One who is out of possession of real property, though entitled thereto, may not use force to recover such possession. *Territory of Hawaii v. Savidge*, 286.
4. Rents of land sold by judicial sale in a partition suit, accruing between date of sale and confirmation, belong to the partitioners, not to the purchasers. *Schlieff v. Clark*, 326.
5. The sovereigns of Hawaii formerly had power to make grants of land between high and low water mark. *Territory of Hawaii v. Liliuokalani*, 88; *Brown v. Spreckels*, 399.
6. A public right of bathing is subordinate to any other lawful use which the littoral owner may desire to make of the beach. *Territory of Hawaii v. Liliuokalani*, 88.
7. Crown lands were alienable by King in 1853. *Brown v. Spreckels*, 399.
8. Accretion belongs to littoral proprietor. *Ibid.*
9. The words, "with the right of extension to low water mark," in a deed of land convey land owned by grantor between the land specifically described and the ocean. *Ibid.*

LAND—Continued.

10. As a rule, land cannot be appurtenant to land. *Ibid.*
11. The word "beach" in a deed may be used in a popular sense, and denote not only the space between high and low water mark, but part of the adjacent land. *Ibid.*
12. In a suit for damages for obstruction of a private way arising from deed, proof may not be made of a public way arising from dedication. *Quadros v. Frear*, 549.
13. Sugar cane is a crop subject to the law of emblements. *Nawahi v. Hakalau Plant. Co.*, 460.
14. Permitting lantana to overgrow land not waste. *Paris v. Vasconcellos*, 590.

LANDLORD AND TENANT.

1. A lease by inexperienced young man with little business ability to a capable business man for an inadequate consideration, the weaker trusting the former to protect his interests, will be cancelled by a court of equity. *Hall v. Winam*, 306.
2. When land is sold in a partition suit, rent accruing between dates of sale and confirmation belong to the partitioners, not to the purchasers. *Schlieff v. Clark*, 326.
3. A lease made by a guardian extending beyond minority of ward is not void, but is binding on the lessee, and valid until disaffirmed by the ward. *Nawahi v. Hakalau Plant. Co.*, 460.
4. Sugar cane is a crop subject to the law of emblements. *Ibid.*
5. If a ward disaffirms a lease on becoming of age, the tenant is entitled to emblements. *Ibid.*
6. Permitting land to become overgrown with lantana held not to be a breach of covenant not to suffer any waste or any improper use of premises. *Paris v. Vasconcellos*, 590.
7. A landlord asking leave of court of equity to sue receiver of its tenant should state the nature of suit proposed and court in which it intends to bring suit. *McChesney v. Kona Sugar Co.*, 680.

LEGITIMACY.

Illegitimate children made legitimate by statute upon the marriage of their parents do not inherit under terms of will giving devise to "children lawfully begotten." *Honolulu Investment Co. v. Rowland*, 271.

LIBEL.

1. Charge held to sufficiently show connection of libellous matter with party claimed to be libelled. *Territory of Hawaii v. Wong Shui King*, 615.
2. Evidence held sufficient to show publication of libel, and that language was used of and concerning complainant. *Ibid.*

LIMITATIONS.

When a fire insurance policy requires that proof of loss be made within sixty days after the fire, and that no suit on the policy shall be sustainable in any court "until after full compliance by the insured with all the foregoing requirements," a failure to file such proof for sixty days after the fire bars any collection of any claim for loss. *Boardman v. Fireman's Fund Ins. Co.*, 21.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

Pendency of a subsequent action elsewhere on life insurance policy is no ground for abatement of the prior action here. *Brown v. Equit. Life Assurance Co. of U. S.*, 80.

MALICIOUS PROSECUTION.

1. An order of a new trial setting aside verdict for defendant in an action for malicious prosecution is an abuse of discretion where there is ample evidence to show that defendant acted upon advice of counsel in good faith. *Ahmi v. Cornwell*, 301.
2. Evidence held to show probable cause for instituting prosecution. *Gaspar v. Nahale*, 574.

MANDAMUS.

Decision of Commissioners of Fire Claims cannot be reviewed on mandamus. *Liverpool & London & Globe Ins. Co. v. Macfarlane*, 481.

MARRIAGE.

1. Seduction subsequent to promise to marry does not make original contract to marry void as based on an immoral consideration. *Brown v. Bannister*, 34.
2. An admission by a woman is competent evidence of marriage against her in a criminal action of adultery, but not against her co-defendant. *Territory of Hawaii v. Castro*, 131.

MECHANIC'S LIEN.

1. A material man of a sub-contractor has a lien on the structure, though he has no contract with its owner, and may rely both on the lien and on the personal liability of the sub-contractor. *Hackfeld & Co. v. Hilo R. R. Co.*, 448.
2. There is no mechanic's lien for cash advanced to a sub-contractor to be used in paying laborers on the work. *Ibid.*
3. Proceedings have been "commenced" within the meaning of the mechanic's lien law when the complaint has been filed and summons issued with the intent that it be served promptly. *Ibid.*

MINORS.

1. A decree in 1858 against a guardian affecting the land of his minor ward in a suit brought against the guardian, and not against the minor, is not subject to collateral attack by the minor or one claiming under him. *Kapiolani Estate v. Atcherley*, 651.
2. A guardian cannot make a lease to extend beyond a ward's minority so as to bind the ward, but such a lease is binding on the lessee until disaffirmed by the ward. *Nawahi v. Hakalau Pl. Co.*, 460.

MORTGAGE.

1. In a suit to foreclose a mortgage, the Court may not decree that unpaid taxes must be paid first from proceeds of the sale of property if the pleadings are silent as to taxes, and mortgagor and mortgagee are the only parties. *T. H. Davies & Co. v. Wakefield*, 201.
2. A condition in a trust deed securing bonds of a corporation, that upon default in payment of interest, the principal shall, upon the option of a majority of the bondholders, become immediately due, does not take away from a minority stockholder his right in equity to compel a foreclosure to collect payment of interest due on bonds held by him. *Guardianship of Parker*, 347.
3. Equity has no jurisdiction of an action brought solely to obtain a writ of possession for a purchaser at a foreclosure made without suit under a power of sale. *Carter v. Kainainahaole*, 515.
4. Failure to prove a mortgage debt against an estate will not bar mortgagee from foreclosing mortgage. *Kaikainahaole v. Allen*, 527.

NEGLIGENCE.

When a runaway horse injures a wagon, it is not necessarily contributory negligence to leave the wagon in street for five minutes without a horse attached. *Ikeda v. Hoe Lung*, 520.

NEGOTIABLE INSTRUMENTS.

1. Failure of consideration on the ground that no title passed by a warranty deed is no defense to an action on a note for the purchase price, so long as the vendee has not been evicted or otherwise injured by the owner of the land. *Makainai v. Goo Wan Hoy*, 280.
2. Notes not stamped in accordance with provisions of U. S. War Tax, Revenue Law of 1898, are incompetent evidence in this Territory. *Makainai v. Goo Wan Hoy*, 607.

NEW TRIAL.

1. An order remanding an equity cause, with direction that evidence be received on an issue raised by amended pleadings filed after the close of the original hearing, and in support of which

NEW TRIAL--Continued.

evidence was offered and rejected, does not direct a "new trial." *In re Hitchcock et al.*, 1.

2. Harmless error is not ground for a new trial. *Brown v. Equit. Life Assurance Soc.*, 80.

3. Will not be granted for improper treatment of jury by trial judge or improper charges where no objection was made before the verdict was rendered. *Hitchcock v. Haw. Tramways Co.*, 137.

4. Court held to have abused discretion in ordering a new trial of action for malicious prosecution, when there was ample evidence to show that defendant acted upon advice of counsel in good faith and without malice. *Ahmi v. Cornwell*, 301.

5. Granted in suit to recover money voluntarily paid on a contract where plaintiff failed to sustain burden of proof that defendant failed to perform his part of contract. *Levy v. Asbill*, 316.

6. New trial refused where evidence sufficient to support verdict, though verdict is contrary to the weight of evidence. *Kapiolani Estate v. Cleghorn*, 330.

7. A mere scintilla of evidence insufficient to support a verdict. *Smith v. Hamakua Mill Co.*, 669.

8. A Supreme Court may set aside a verdict as contrary to weight of evidence, even though the trial court fails to do so. *Ibid.*

NONSUIT.

It is error to grant motion for nonsuit in an action of assumpsit for medical services where answer admits all facts except value of services. *Armitage v. Bishop*, 134.

NOTICE.

1. An insurance company is estopped from avoiding a policy for facts which existed to its knowledge at time of issuance of policy. *Choy Look See v. Royal Ins. Co.*, 5.

2. A general appearance in a case is a waiver of any defect in a published notice to appear. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50.

3. Notice to one party jointly liable for breach of a contract is sufficient notice to all. *Harrison v. Magoon*, 418.

4. A resolution by the Board of Health that a building should be destroyed by fire because unsanitary, if made without notice to the owner, does not bind him as to the fact of the infection of the building. *Akwai v. Royal Ins. Co.*, 533.

5. Notice by publication in divorce suits. *Winslow v. Winslow*, 498; *Proper v. Proper*, 596.

NUISANCE.

1. The Board of Health is not authorized to declare that a nuisance which is not one in fact. *Akwai v. Royal Insurance Co.*, 533.

NUISANCE—Continued.

2. Indecent exposure in a public place is a common nuisance, though actually seen by only one person. *Ter. of Hawaii v. Martin*, 304.

PARTIES.

1. Where sole defendant is named Yim You, and the return of service is of service on "Kealalaina and Ah Puck for Yim You," Kealalaina and Ah Puck are not made parties, but are presumably agents of Yim You, and trial court may refuse an amendment making defendants Kealalaina and Ah Puck doing business under firm name of Yim You. *Ter. of H. v. Yim You*, 112.
2. Beneficiaries should be made parties to suits in equity by or against trustees. *Magoon v. Lai Young*, 376.
3. It is proper for a trustee to bring an action of ejectment in his own name without describing himself as trustee. *Hawaiian Trust and Investment Co. v. Barton*, 641.
4. A decree made in 1858 in a suit to declare minor's trustees brought against a guardian, and not the minor wards, is binding on one holding under the minors in a suit brought to enforce the decree against her. *Kapiolani Estate v. Atcherley*, 651.
5. Any error in making a guardian instead of a minor a party cannot be taken advantage of in a collateral attack on a decree. *Ibid.*

PARTITION.

1. One who has fee in a piece of land subject to a life estate in half the land may sue for a partition. *Baker v. Puni*, 179.
2. Receiver held improperly appointed. *Lee Chu v. Noar*, 648.
3. A decree in partition suit should set out respective interests of the parties. *Ibid.*
4. Evidence in partition suit held sufficient to warrant an order of sale. *Ibid.*

PARTNERSHIPS.

1. A debt owing to a partnership may not be garnisheed in an action against a partner. *Ming Hym v. Young Tong*, 300.
2. Under partnership articles prohibiting any partner from creating any liability on behalf of the company, one partner cannot bind the other partners by a contract to guarantee to the extent of £2,000 satisfaction with the business to a person entering into the business with them. *Harrison v. Magoon*, 418.
3. One partner has no authority to form a new partnership including within its members all his original partners. *Ibid.*
4. Partnership articles construed and held that partnership was terminable at will of a partner before expiration of term, and that the general provision for arbitration does not prevent suit without arbitration. *Hind v. Low*, 438.

PHYSICIANS.

1. It is error to grant motion for non-suit in action of assumpsit for medical services where answer admits all facts except value of services. *Armitage v. Bishop*, 134.
2. Fees for attendance on last illness of decedent are not entitled to priority of payment over ordinary debts. *Grace v. Smith*, 144.

PLEADING AND PRACTICE.

1. A general denial in an action to quiet title does not operate as a disclaimer, and a defendant pleading it may prove his own title without having set it out. *Hakalau Pl. Co. v. Kahuena*, 189.
2. Failure to notify opposing counsel of the filing of a bill of exceptions, as provided by Circuit Court Rule 15 C, does not warrant the dismissal of the exceptions in the Supreme Court. *Territory of Hawaii v. Ah Moon*, 203.
3. Where an illegal sentence has been imposed, the case may be remanded to the trial court for imposition of a legal sentence. *Territory of Hawaii v. Savidge*, 286.
4. Where a claim on a book account is split and two suits brought, defendant's remedy is to plead the judgment in the first suit tried in bar of the second, not to plead to the jurisdiction. *Phillips v. Lun Chong Co.*, 295.
5. A court has no right to establish a practice allowing a continuance as a matter of course. *McBryde Estate v. Gay*, 313.
6. The judge may direct a verdict for defendant in an action of ejectment where there is evidence that defendant has for the statutory period been in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained by any showing that it was by permission of true owner. *Albertina v. Kapiolani Estate*, 321.
7. Proceedings have been "commenced" within the meaning of the mechanic's lien law when the complaint has been filed and summons issued with the intent that it be served promptly. *Hackfeld & Co. v. Hilo R. R. Co.*, 448.
8. Service of summons in divorce cases where libellee cannot be found may be made in newspapers declared by the Supreme Court to be newspapers of general circulation. *Winslow v. Winslow*, 498.
9. It is not necessary for a corporation plaintiff to allege its incorporation in its declaration. *Hawaiian Mill Co. v. Andrade*, 500.
10. That a corporation has capacity to sue is presumed until brought in question by proper plea. *Ibid.*
11. Discretion of trial judge held not abused in granting motion to set aside a default. *Tibbets v. Pali*, 517.
12. Discretion of judge in refusing to reopen default held not to be shown to have been abused. *Kapiolani Estate v. Grinbaum & Co.*, 583.

PLEADING AND PRACTICE—Continued.

13. Writ of error dismissed because plaintiff fails to comply with Rule 2 of Supreme Court requiring briefs to be filed within five days after argument. *Orpheum Co. v. Dimond & Co.*
14. Rehearing in Supreme Court denied as point claimed to have been overlooked was disposed of, though not expressly referred to in the decision. *Harrison v. Magoon*, 532.
15. Recovery cannot be had against a part only of joint contractors. *Ibid.*
16. The Supreme Court rule that motions will be heard on opening day of each session does not deprive the court of power to hear motions on later days. *Kapiolani Estate v. E. Peck & Co.*, 580.
17. District Magistrate should not declare defendant in default for lack of written pleading. *Paris v. Vasconcellos*, 590.
18. An answer in replevin that property replevied belongs to defendant, and not to plaintiff, will not preclude defendant from proving property to belong to third party. *Greenwell v. Gouveia*, 636.
19. In suit over ownership of a heifer a District Magistrate may permit its production at some convenient place and personally examine its ear-mark. *Ibid.*
20. In a motion for leave to sue a receiver, the nature of the proposed suit and the court in which it is to be brought should be stated. *McChesney v. Kona Sugar Co.*, 680.

See EXCEPTIONS, JUDGMENTS, NON-SUIT, EQUITY,
WRIT OF ERROR.

POWER OF ATTORNEY.

A proxy is not a power of attorney within the meaning of the Stamp Duty Act, §941 Civ. L. *Valkenberg v. Treas. T. of H.*, 182.

PRIVY COUNCIL.

In 1850 the Privy Council had no power to enact laws, but were only advisers to the King. *Territory of Hawaii v. Liliuokalani*, 88.

PROBATE.

1. A writ of error may issue from the Supreme Court to a Circuit Judge sitting in Probate at Chambers. *Holloway v. Brown*, 170.
2. At Probate, in a guardianship proceeding, a Circuit Judge has no jurisdiction to revise a decree of a Circuit Court in a divorce proceeding as to custody of children. *Ibid.*

See WILLS, EXECUTORS and ADMINISTRATORS.

PROCESS.

1. A general appearance in a case is a waiver of any defect in a published notice to appear. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50.

PROCESS—Continued.

2. In divorce cases when libellee cannot be found, publication of summons may be made in newspapers declared by the Supreme Court to be of general circulation. *Winslow v. Winslow*, 498.
3. Service by publication in divorce cases may not be made in newspapers which have neither been declared by Supreme Court to be of general circulation or are the ones named in Civ. L., §1933. *Proper v. Proper*, 596.
4. Service of summons by delivery of a copy which does not have seal of court or signature of Clerk of Court is defective, and such defect cannot be cured by amendment. *Hayashi v. Iwata*, 627.

PROMOTERS.

1. Promoters who are also subscribers to stock do not cease to be promoters and become stockholders until articles of incorporation are filed with Treasurer of Territory. *Hitchcock v. Hustace*, 232.
2. Promoters are fiduciaries of the corporations they promote and their stockholders, and cannot make a valid agreement acting for themselves and company at same time, giving themselves \$35,000 cash profit and 6,000 shares paid up stock without obtaining consent of others interested, and a failure to disclose the facts is a fraud that deprives them of right to compensation for their services. *Ibid.*

PROPERTY.

Construed to mean "dominion over a thing" in ancient statute as to fisheries. *Carter v. Territory of Hawaii*, 465.

PROXY.

See POWER OF ATTORNEY.

PUBLIC OFFICERS.

1. There may be a de facto officer, even though the office is already filled by a de jure officer, if the latter is not in possession of the office. *Hind v. Wilder's S. S. Co.*, 215.
2. The provision of the Salaries Appropriation Act of 1901 that no person holding more than one office shall draw more than the salary of the highest office if that amount to \$1,200 a year applies where the salary of one such office is payable under that act and the salary of the other under the Current Expense Act. Within the meaning of this provision deputy sheriffs, public land agents and inspectors of elections are officers; public school teachers and clerks of election precincts are not. *Appeal of Cooper*, 282.

PUBLICATION.

1. A general appearance in a case is a waiver of any defect in a published notice to appear. *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 50.
2. Publication of summons in divorce cases may be made in newspapers declared by the Supreme Court to be newspapers of general circulation. *Winslow v. Winslow*, 498.
3. Hawaiian Gazette and Kuokoa are newspapers of general circulation. *Ibid.*
4. Publication of summons in divorce cases in newspapers not shown to be the Government Gazette or Ke Au Okoa, or to have been by the Supreme Court declared to be newspapers of general circulation, is insufficient service. *Proper v. Proper*, 596.

QUIETING TITLE.

1. A general denial does not operate as a disclaimer in an action to quiet title. *Hakalau Plantation Co. v. Kahuena*, 189.
2. A defendant in an action to quiet title need not set out his own title, but may prove it, upon pleading merely a general denial. *Ibid.*
3. In a statutory action to quiet title brought in a court of law, the judgment may include an award of possession and be enforced by a writ of possession. *Mossman v. Dole*, 365.

RECEIVERS.

1. Receiver held to be improperly appointed in a partition suit, the bill containing no specific prayer for a receiver, the evidence showing no exclusion of complainants by respondent from the property and no mismanagement. *Lee Chu v. Noar*, 648.
2. A court of equity properly refuses leave to sue a receiver, when applicant does not state what nature of action he desires to bring nor in what court he desires to sue. *McChesney v. Kona Sugar Co.*, 680.

RECORD.

1. A transcript of evidence not made part of the bill of exceptions by reference nor filed in the Circuit Court will not be considered by the Supreme Court. *Territory of Hawaii v. Ah Moon*, 203.
2. Where no transcript of evidence is in record the Supreme Court will not consider any assignment of error that a judgment is contrary to evidence or that Circuit Judge abused his discretion in ordering execution to issue pending appeal. *Orpheum Co. v. Diamond & Co.*, 522.
3. Record of a deed is competent evidence, though the original is in court and the record would tend to impeach the validity of the original. *Hong Quon v. Chea Sam*, 276.

RECORD—Continued.

4. A question of jurisdiction over the subject matter may be raised in Supreme Court on appeal, though record of District Court does not show it raised there except in notice of appeal filed after judgment rendered. *Lewers & Cooke v. Redhouse*, 290.

REHEARING.

1. Rehearing denied as point claimed to have been overlooked, while not expressly referred to, was disposed of by the decision. *Harrison v. Magoon*, 530.

2. Rehearing will not be granted because court did not consider a point raised by exceptions, but not mentioned in counsel's brief. *Paris v. Magoon*, 638.

3. Rehearing denied. *Makainai v. Goo Wan Hoy*, 683; *In re Assessment of Taxes, H. C. & S. Co.*, 687.

RENTS.

See LANDLORD and TENANT.

REPLEVIN.

When defendant makes plea that a heifer replevied is his, and not the property of plaintiff, the material part of the plea is that it is not the property of the plaintiff, and defendant is not precluded by his plea from showing that the heifer is the property of a third party. *Greenwell v. Gouveia*, 636.

RES ADJUDICATA.

1. A decree binds co-defendants if they are adversary to each other, though there be no cross pleadings between themselves. *H. C. & S. Co. v. Wailuku Sugar Co.*, 50.

2. So far as the ultimate matter adjudicated is concerned, all intermediate matters are conclusively presumed to have been settled, but as to other ultimate matters, only such intermediate matters as were actually raised and decided are regarded as settled. *Ibid*; *Paris v. Magoon*, 612.

3. A decree is binding as to necessary inferences from it. Principles of res adjudicata applied to decision on water rights on Wailuku stream, Maui. *H. C. & S. Co. v. Wailuku Sugar Co.*, 50.

4. An action on a part of a book account bars a later action on the remainder. *Lewers & Cooke v. Redhouse*, 290; *Phillips v. Lun Chong Co.*, 295.

5. A resolution of a Board of Health made without notice to the owner that a building should be destroyed because infected with plague does not bind the owner as to the finding that the building is so infected. *Akwai v. Royal Ins. Co.*, 533.

6. A decree dismissing bill for specific performance without raising question of damages does not bar suit for damages for breach of contract. *Paris v. Magoon*, 612.

RULES.

1. A Circuit Court has no power to make a rule allowing a continuance as a matter of course. *McBryde Estate v. Gay*, 313.
2. Circuit Court rule 15 c is directory, and a failure to notify opposite counsel of the filing of a bill of exceptions does not warrant dismissal of the exceptions in Supreme Court. *Territory of Hawaii v. Ah Moon*, 203.
3. Circuit Court rule 15 c providing that in case of absence of a judge who presided at a trial, a bill of exceptions may be filed with the Clerk, applies to absence from city or protracted illness—not to absence in his chambers or temporary absence from the court house, and a bill of exceptions filed with Clerk when judge is in his chambers may be stricken from record on motion. *Ii Estate v. Mele*, 311.
4. The Supreme Court rule that motions will be heard on opening day of each session does not deprive the Court of power to hear motions on later days. *Kapiolani Estate v. Peck & Co.*, 580.

SALE.

1. Evidence held to support judgment of trial court in suit for breach of warranty in sale of a horse. *Lillis v. Carty*, 132.
See JUDICIAL SALES.

SEDUCTION.

1. Evidence that seduction was accomplished by virtue of a promise of marriage held sufficient to support verdict. *Brown v. Bannister*, 34.

SENTENCE.

1. Where an error has been made in a sentence of imprisonment by omitting hard labor, the Supreme Court may remand the case to the trial court with directions to impose a new and legal sentence. *Ter. of Hawaii v. Savidge*, 286.

SERVICE OF SUMMONS.

1. In divorce cases when libellee cannot be found, publication of summons may be made in newspapers declared by the Supreme Court to be of general circulation. *Winslow v. Winslow*, 498.
2. Service by publication in divorce cases may not be made in newspapers neither shown to have been declared by Supreme Court to be of general circulation nor to be the ones named in Civ. L., §1933. *Proper v. Proper*, 596.
3. Service of summons by delivery of a copy which does not have seal of court or signature of Clerk of Court is defective, and such defect cannot be cured by amendment. *Hayashi v. Iwata*, 627.

SPECIFIC PERFORMANCE.

1. May be brought to compel the conveyance of land under agreement where purchaser has failed to pay instalments of purchase price at times agreed, if seller has waived forfeiture by accepting instalments on account after time for their payment had passed. *Tomikawa v. Gama*; 175.

SPECIFIC PERFORMANCE—Continued.

2. A lessee's contract to "sell and relinquish all claims and deeds to the land" is not a contract to obtain lessor's consent to an assignment, but is a contract to release lessee's right, title and interest, and may be enforced in equity. *Jones v. Petersen*, 427.
3. A decree dismissing bill for specific performance, if question of damages is not raised, does not bar action for damages for breach of contract. *Paris v. Magoon*, 612.

SPENDTHRIFT.

1. Trust deed of a person just released from guardianship as a spendthrift, conveying all her estate to a trustee and giving one-fifth to an attorney as a fee, is convincing evidence that guardianship is proper. *In re Estate of Kapukini*, 204.
2. The burden of proving that there is no reason for continuation of guardianship is on the ward. *In re Guardianship of Haneku*, 413.
3. Evidence held not to prove reformation of spendthrift. *Ibid.*

STAMP DUTY.

1. A proxy is not a power of attorney within meaning of §941 Civ. L., and is not subject to stamp duty. *Valkenberg v. Treas. T. of H.*, 182.
2. The imposition of stamp duties for the purpose of revenue is not inconsistent with the clause of the U. S. Constitution relating to uniformity. *Tomikawa v. Gama*, 431.
3. The progressive stamp tax on deeds, prescribing a higher rate of taxation on deeds for higher consideration, is valid, as the classification is reasonable, and all within each class are treated alike. *Ibid.*
4. The Hawaiian revenue stamps in use are not invalid as being stamps of the Republic of Hawaii. *Ibid.*
5. A decree that defendant give a "good and sufficient deed" requires defendant to give a deed properly stamped. *Ibid.*
6. Promissory notes not stamped in accordance with provisions of U. S. revenue tax law of 1898 are not competent evidence in this Territory. *Makainai v. Goo Wan Hoy*, 607.
7. Repeal of the provision of the U. S. revenue tax law requiring stamps on notes does not make notes made before such repeal and not properly stamped competent in evidence. *Makainai v. Goo Wan Hoy*, 683.

STARE DECISIS.

1. Argument of hardship, of contemporaneous and long continued construction, does not apply to a statute as to publication of summons in divorce cases that is explicit and does not admit of construction. *Proper v. Proper*, 596.

STARE DECISIS—Continued.

2. Decrees rendered during a period extending from 45 years ago to 15 years ago, settling the titles to real estate and made in conformity to a procedure then regarded as good and impliedly decided to give jurisdiction to the court and to bind minor wards, should be now upheld, irrespective of any change in procedure, and though courts of today think differently as to the correctness of the former practice. *Kapiolani Estate v. Atcherley*, 651.

STATUTES.

1. Act 10 of the Laws of 1901 made no appropriation for payment of bailiffs. *First Judge v. Auditor*, 393.
2. Act 15 of Laws of 1901 creating Commissioners of Fire Claims, and providing that their decisions shall be final and no appeal shall lie therefrom, is not contrary to the provisions of the Organic Act creating the judicial system of the Territory. *Liverpool & London & Globe Ins. Co. v. Macfarlane*, 481.
3. Sec. 4, chapter xvi, Laws of 1870, providing for publication of summons in divorce cases in the Government Gazette and Ke Au Okoa is amended by chapter xxxvi of Laws of 1892 providing generally for publication of legal advertisements in newspapers declared by the Supreme Court to be of general circulation. *Winslow v. Winslow*, 498.
4. The provision of the Salaries Appropriation Act of 1901 that no person holding more than one office shall draw more than the salary of the highest office, if that amount to \$1,200 a year, applies where the salary of one such office is payable under that Act and the salary of the other under the Current Expense Act. Within the meaning of this provision deputy sheriffs, public land agents and inspectors of election are officers; public school teachers and clerks of election precincts are not. *Appeal of Cooper*, 282.

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| 30 | " | 464, | <i>Halstead v. Pratt</i> , | 38. |
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| 31 | " | 141, | Sec. 1, <i>Fairer v. Hackfeld & Co.</i> , | 211. |
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 31 " 158 " 86, Thayer v. Lidgate, 546.
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- " Sec. 1823, Haw. Com. & Sug. Co. v. Wailuku Sug. Co., 52.
- " Sec. 1835, Tomikawa v. Gama, 436.
- " Sec. 1849, Hong Quon v. Chea Sam, 277.
- " Sec. 1852, Hong Quon v. Chea Sam, 278.
- " Sec. 1852, Tomikawa v. Gama, 436.
- " Sec. 1876, Honolulu Investment Co. v. Rowland, 272.
- " Sec. 1890, Dole v. Gear, 556.
- " Ch. 125, Dole v. Gear, 564.
- " Sec. 1933, Winslow v. Winslow, 498.

STATUTES CITED—Continued.

- " Sec. 1933, *Proper v. Proper*, 597.
- " Sec. 1943, *Nobriga v. Nobriga*, 156.
- " Sec. 1944, *Holloway v. Brown*, 174.
- " Sec. 1947, *Nobriga v. Nobriga*, 156.
- " Sec. 1965, *Guardianship of Humeku*, 413.
- " Sec. 1966, *Guardianship of Humeku*, 414.
- " Sec. 1970, *Kapiolani Estate v. Atcherley*, 662.
- " Sec. 1975, *Guardianship of Humeku*, 415.
- " Sec. 2009, *Hawaii Mill Co. v. Andrade*, 501.
- " Sec. 2033, *Hitchcock v. Hustace*, 241.
- " Ch. 130, *Brown v. Equitable Life Ass. Soc. of U. S.*, 86.
- " p. 804 Sec. 56, *Harris v. Cooper*, 145.
- " p. 815 Sec. 89, *Harris v. Cooper*, 145.
- Penal Laws Sec. 61, *Territory of Hawaii v. Cheong Jim Kong*, 610.
- " Sec. 89, *Territory of Hawaii v. Castro*, 131.
- " Sec. 132, *Gaspar v. Nahale*, 576.
- " Sec. 257, *Ex parte Smith*, 246.
- " Sec. 262, *Ex parte Smith*, 246.
- " Sec. 299, *Territory of Hawaii v. Wong Shui King*, 620.
- " Sec. 324, *Territory of Hawaii v. Martin*, 305.
- " Sec. 358, *Ikeda v. Hoe Lung*, 521.
- " Sec. 444, *Territory of Hawaii v. Sing Kee*, 589.
- " Secs. 454 & 457, *Territory of Hawaii v. Sing Kee*, 589.
- " Secs. 545 & 547, *Territory of Hawaii v. Sing Kee*, 589.
- " Sec. 606, *Territory of Hawaii v. Sing Kee*, 589.
- " Sec. 777, *Territory of Hawaii v. Ah Moon*, 203.
- " Secs. 877-9, *Akwai v. Royal Insurance Co.*, 537.
- " Secs. 1381-3, *Appeal of Cooper*, 285.
- " Ch. 84, *Carter v. Territory of Hawaii*, 471.
- Probate Rule III of April 27, 1871, *Smith v. Hamakua Mill Co.*, 676.
- Supreme Court Rule 1, *Kapiolani Estate v. Peck & Co.*, 581.
- Supreme Court Rule 2, *Orpheum Co. v. Dimond & Co.*, 524.
- Supreme Court Rule 4, *Ikeda v. Hoe Lung*, 521.
- Supreme Court Rule 17, *Hind v. Wilder's S. S. Co.*, 232.
- Circuit Court Rule 15 C, *Territory of Hawaii v. Ah Moon*, 203.
- Circuit Court Rule 15 C, *Ii Estate v. Mele*, 311.

STATUTE OF LIMITATIONS.

1. Where one is shown for statutory period in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under a lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile. *Albertina v. Kapiolani Estate*, 321; *Kapiolani Estate v. Cleghorn*, 330; *Smith v. Hamakua Mill Co.*, 669.

STATUTE OF LIMITATIONS—Continued.

2. The provision of Article 39 of the Constitution of 1864 that the "King's private lands and other property are inviolable," did not prevent the statute of limitations from operating on such lands. *Kapiolani Estate v. Cleghorn*, 330; *Kapiolani Estate v. Kaneohe Ranch Co.*, 643.
3. A mere scintilla of evidence is insufficient to support a verdict. *Smith v. Hamakua Mill Co.*, 669.
4. Failure to prove a mortgage debt within six months from advertised notice to claimants will not bar the mortgage. *Kaikainahaole v. Allen*, 527.

SUPREME COURT.

1. A decree of the Supreme Court in admiralty will not be set aside because the decree appealed from was made by the successor of the judge who tried the case and made decision. *Hind v. Wilder's S. S. Co.*, 215.
2. Cannot review decision of Commissioners of Fire Claims. *Liverpool & London & Globe Ins. Co. v. Macfarlane*, 481.
3. The Supreme Court rule that motions will be heard on opening day of each session does not deprive the court of power to hear motions on later days. *Kapiolani Estate v. Peck & Co.*, 580.

TAXATION.

1. The exemption in the income tax law of 1901 of "any bequest or inheritance otherwise taxed as such" does not apply to an inheritance "otherwise taxed" under the Federal laws. *Halstead v. Pratt, Tax Assessor*, 38.
2. An inheritance of personal property is "acquired" when received, not at death of decedent, and is taxable as income of the year when received. *Halstead v. Pratt, Tax Assessor*, 38.
3. The Territorial income tax should be levied on balance only of an inheritance of personal property after deducting the amount of Federal succession tax paid. *Halstead v. Pratt, Tax Assessor*, 38.
4. Taxes on land are assessable to an owner who agrees to sell land within 18 months on certain conditions until he conveys title. *Shaw v. Booth*, 117.
5. An assessment on a tract of land is not void because a small part of it was not owned by party to whom it was assessed. *Ibid.*
6. The sole remedy for a party who has been assessed for an entire tract of land previously owned by him, but of which he had sold part, is by appeal to the Tax Appeal Court. *Shaw v. Booth*, 117.
7. A person failing to make a tax return is without remedy when assessed for an entire tract of land previously owned by him of which he has sold part. *Ibid.*
8. Income derived from property exempt from taxation is also exempt. *Oahu Ry. & Land Co. v. Pratt*, 126.

TAXATION—Continued.

9. Oahu R'y. & Land Co. is exempt from taxation on income derived from wharfage, storage, scales used for weighing freight to be carried on railroad, but not for a government subsidy not necessary for the existence of road. *Ibid.*
10. A tax law must be construed strictly, and not made to cover objects not clearly within intention of the Legislature. *Valkenberg v. Treas. of Hawaii*, 182.
11. In a suit to foreclose a mortgage in which the government and Tax Assessor are not parties, and taxes are not mentioned in pleadings, the Court may not decree that the taxes unpaid are a prior lien. *T. H. Davies & Co. v. Wakefield*, 201.
12. Depreciation in value of a mill due to abandonment by owner for a new mill, required by changes in business, cannot be taken into account in estimating net income subject to taxation. Such depreciation is not a loss within meaning of Sec. 4 of income tax law. *Haw. Com. & Sug. Co. v. Tax Assessor*, 601.
13. A tax-payer is entitled to an appeal when a return is filed and the amount of his property is increased from his return, or the character of the property is changed so that it is subject to a greater taxation. *In re taxes May & Co.*, 639.
14. In estimating net income, deductions may not be made for expenditures for new buildings which do not increase the value of the plantation and are not necessary. *In re assessment of taxes, H. C. & S. Co.*, 687.

See STAMP DUTIES.

TENANTS IN COMMON, see CO-TENANTS.

TRUST.

1. A trust to "keep and preserve" an interest in land for the benefit of the grantor "subject to such further instructions which the grantor may give" the trustee, is not within the operation of the Statute of Uses. *Kidwell v. Godfrey*, 138.
2. If a trustee has overpaid a beneficiary entitled to income regularly, he or his successor in trust may retain future income to the amount of the over-payments. *In re Estate of Holt*, 164.
3. Promoters are fiduciaries of the corporation they promote, and cannot make a valid agreement, acting at same time for themselves and company, giving themselves \$35,000 cash profit and 6,000 shares of paid up stock, without obtaining consent of others interested, and a failure to disclose the facts is a fraud that deprives them of any right to compensation for their services. *Hitchcock v. Hustace*, 232.
4. Beneficiaries should be made parties to suits in equity by or against trustees. *Magoon v. Lai Young*, 376.

TRUST—Continued.

5. Under a requirement in a trust deed that the trustee convey the trust property upon request of one cestui que trust and the guardian of others, a conveyance need not be made upon request of such cestui que trust after the request by the guardian becomes impossible by reason of the becoming of age of all cestuis que trustent. *Carter v. Carter*, 505.

6. A trust deed construed to create trust to continue through life of a life tenant, notwithstanding the becoming of age of certain minor cestui que trustent. *Carter v. Carter*, 505.

7. It is proper for a trustee to bring an action of ejectment in its own name without describing itself as a trustee. *Haw. Trust and Investment Co. v. Barton*, 641.

See GUARDIAN.

VESTED RIGHTS.

Ancient Hawaiian statutes on fisheries gave no vested rights in fisheries to any land owners. *Carter v. Territory of Hawaii*, 465.

WAIVER.

1. An insurance agent cannot make oral waiver of a provision in the policy where the policy provides that no agent can make waiver unless such waiver be written upon or attached to the policy. *Boardman v. Fireman's Fund Ins. Co.*, 27.

2. A general appearance in a case is a waiver of any defect in a published notice to appear. *H. C. & S. Co. v. Wailuku Sug. Co.*, 50.

3. A party may waive his right to litigate a matter as to one thing without waiving his right to litigate it as to another thing. *Ibid.*

4. A refusal of a life insurance company to pay a policy on other grounds waives a requirement of a demand. *Brown v. Equit. Life Ass. Soc. of U. S.*, 80.

5. A forfeiture under a contract to sell, by failure of buyer to pay instalments of purchase price on time, may be waived by the seller's taking payments later and treating contract as in force. *Tomikawa v. Gama*, 175.

6. Irregularity of proceedings before a Master in Chancery because of his failure to take an oath may be waived by stipulation. *Ibid.*

7. The balance of a book account not sued upon is waived by an action on a part. *Lewers & Cooke v. Redhouse*, 290.

8. Approval of a statute of limitations by the Sovereign would not be a waiver of any constitutional exemption. *Kapiolani Estate v. Cleghorn*, 330.

WARRANT.

An arrest without warrant is legal where officers see offense of selling liquor without license committed. *Ter. of Hawaii v. Sing Kee*, 586.

WARRANTY.

Evidence held to support judgment of trial court in suit for breach of warranty in sale of a horse. *Lillis v. Carty*, 132.

WASTE.

Permitting land to become overgrown with lantana held not to be a breach of covenant not to suffer any waste. *Paris v. Vasconcellos*, 590.

WATER RIGHTS.

1. In Iao Valley, Wailuku. *H. C. & S. Co. v. Wailuku Sug. Co.*, 50.
2. Kamehameha V. had power to make grant of land to low water mark. *T. of H. v. Liliuokalani*, 88.
3. There is no public right of bathing that will authorize an injunction against such a use of the beach as will interfere with it. *Ibid.*
4. Only waters which are navigable in fact are "navigable waters." *Ibid*; Definition of beach. *Brown v. Spreckels*, 399.
5. The ancient Hawaiian statutes that gave land-owners fishing rights in adjacent waters were not in the nature of grants, and gave no vested rights. *Carter v. Territory of Hawaii*, 465.

WILLS.

1. Evidence as to undue influence held sufficient to support verdict for contestants. *In re will of Naoiwi*, 43.
2. A devise of "all that piece and parcel of land" carries the fee. *Keanu v. Kaohi et al.*, 142.
3. An expression in will that a devise of land to a wife "is to be her dower without any personal property," does not show an intention that the devise was to be for life only. *Ibid.*
4. "Children" construed as a word of purchase, not of limitation. *Honolulu Investment Co. v. Rowland*, 271.
5. Will construed not to create an estate tail. *Ibid.*
6. Children born out of wedlock who become legitimate by statute upon the marriage of their parents do not inherit land devised to "children lawfully begotten." *Ibid.*
7. A devise to a widow of one-third the rent of land gives her a life estate in one-third the land. *Bertelman v. Kahilina*, 378.
8. Where a will gives rent of land to 9 children equally until expiration of a 25-year lease, and then to three sons, or such of them as pay the other surviving children \$5,000 apiece, and provides that if at end of a year from expiration of the lease none of the sons make such payment the land shall be sold or leased and income or rent divided equally among the nine children or their heirs or assigns, it should be construed as giving equal vested estates in fee to the children defeasible upon the performance at expiration of lease

WILLS—Continued.

of conditions by the sons, who meanwhile have contingent executory devises in such interests. *Ibid.*

9. Will construed to give life tenant power to make deeds conveying land in fee simple, at her discretion, without order of court. *Walker v. Bickerton.*

WRIT OF ERROR.

1. A writ of error may issue from the Supreme Court to a Circuit Judge sitting in Probate, at chambers. *Holloway v. Brown*, 170.

2. Where no brief is filed by plaintiff in error within five days after argument the writ of error may be dismissed. *Orpheum Co. v. Dimond & Co.*, 522.

3. Where no transcript of evidence is in record, the Supreme Court will not consider any assignments of error that a judgment is contrary to evidence, or that Circuit Judge abused his discretion in ordering execution to issue pending an appeal. *Ibid.*

4. A motion to amend assignments of error in a writ of error is made too late when made pending hearing of a motion for rehearing. *Orpheum Co. v. Dimond & Co.*, 577.

5. Where record shows no error, the judgment of trial court will be affirmed. *Ibid.*; Quashed where issued before bond filed required by Civ. L., §1450. *Hackfeld & Co. v. Hilo R. R. Co.*, 695.

WRIT OF PROHIBITION.

Will issue to prevent enforcement by contempt proceedings of an order for temporary maintenance in equity pending an appeal. *Dole v. Gear*, 554.

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